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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CATERPILLAR, INC., *Petitioner*

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 302(a) of the Labor Management Relations Act forbids an employer to pay or agree to pay the union officials who represent its employees. Section 302(c)(1) exempts payments to an official who is a current or former employee if the payments are made "by reason of" the official's past or present "service as an *employee*." Sitting *en banc*, a divided Third Circuit overruled its own precedent and became the first court of appeals to accept the contention that this exemption extends to the provision of current, full-time wages to full-time union officials who no longer perform any work for the employer. According to the majority, the exemption applies simply if union officials were formerly employed by the payor and if the payments were provided for in a collectively bargained agreement.

This case thus presents the following question:

• Whether section 302(c)(1) permits an employer to pay or agree to pay the current wages of full-time union officials who are former employees of the employer but who no longer perform any work for the employer.

PARTIES TO THE PROCEEDING

The petitioner is Caterpillar Inc. The respondents are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its affiliated Local Union 786.

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Petitioner, Caterpillar Inc., respectfully petitions for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals, sitting *en banc*, App., *infra*, at 1a, are reported at 107 F.3d 1052 (3d Cir. 1997). The *sua sponte* order of the court of appeals setting this case for rehearing *en banc*, App., *infra*, at 47a, is unreported. The opinion of the district court, App., *infra*, at 49a, is reported at 909 F. Supp. 254 (M.D. Pa. 1995).

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on March 4, 1997. App., *infra*, at 46a. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (1994 & Supp. I 1995), is reproduced in the appendix in full. App., *infra*, at 66a.

STATEMENT

This case concerns a company's agreement to pay the wages of full-time union officials who no longer perform any work for the company and whose sole function is to represent the company's employees. When the union at issue demanded an increase in those payments and punctuated that and other demands with a four-month strike, the company canceled the existing wage payments to try to gain leverage in the protracted labor dispute. The union struck back by filing unfair labor practice charges with the National Labor Relations Board, insisting that the company could not lawfully stop the payments. In response, the company filed this action seeking a declaratory judgment that the payments were illegal under section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (1994 & Supp. I 1995). Sitting *en banc*, a divided Third Circuit overruled its own precedent to reverse the district court and approve the payments. This petition seeks review of that decision.

The company at issue is the petitioner, Caterpillar Inc., which manufactures earth-moving equipment and diesel engines in production facilities throughout the United States, including one in York, Pennsylvania, which is involved in this case. Appendix filed in Court of Appeals at 157-58 [hereinafter "Cir. App."]. Caterpillar is an "employer" within the meaning of section 302, and, since 1954, has recognized the respondents, the UAW and its Local 786, as the exclusive bargaining representative of the hourly employees at the York facility. *Id.* at 158. The UAW and Local 786 (hereinafter collectively "the UAW" or "the union") are "labor organizations" within the meaning of section 302. *Id.*

The dispute in this case originated in 1973, when the UAW demanded that Caterpillar pay the salaries of certain full-time union officials. Cir. App. at 160-61, 503-04. After a strike over this and other issues, Caterpillar agreed to recognize the Chairman of the Local's Grievance Committee as a full-time union representative and to provide him with regular wages and benefits. *Id.* at 167, 542. In 1979, the company agreed to extend those payments to a full-time "Alternate Committeeman." *Id.* at 167.

The Chairman and Alternate Committeeman (hereinafter collectively the "Committeemen") represent the Local's members, interpret and enforce the collective bargaining agreement on their behalf, and engage in other activities in support of the Local. App., *infra*, at 59a-60a.[1] Even though the Committeemen were on full-time leaves of absence for union business, Caterpillar paid them regular wages and benefits under sections 4.6 and 4.7 of the collective bargaining agreement. *Id.* at 75a. Despite that remuneration, however, the Committeemen were employees of the union, not of the company. Cir. App. at 162.[2] Indeed, company-

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1 Significantly, the Chairman is also a member of the committee that negotiates the very collective bargaining agreements that provide for his compensation. App., *infra*, at 59a-60a.

2 Every court to consider this issue has reached that conclusion. App., *infra*, at 7a, 60a, 78a-79a. The Committeemen are functionally equivalent to assistant union business agents in, for example, the construction and retail food industries. *Id.* at 76a. They conduct their business and maintain their records at the union hall, not in the plant. Indeed, the Chairman generally spends only one day per week at the plant when he is in town. *Id.* at 58a; Cir. App. at 468.

The Committeemen handled the union's business and answered only to the union. App, *infra*, at 78a-79a. Caterpillar assigned them no work and did not supervise them in their union activities. *Id.* at 58a-59a. They were "assigned" to the Labor Relations Department at the York facility for payroll purposes, but they performed no work for that department. Cir. App. at 161. They

wide, at least five individuals in similar positions have retired while on paid union leave, and several others have been on paid union leave longer than they ever served as active employees. *Id.* at 168.

Deciding in 1991 that it was "time they got a raise," the UAW demanded that Caterpillar significantly raise the wages of at least certain Committeemen. App., *infra,* at 79a; Cir. App. at 168. The change would have substantially increased what had *already* become approximately a $2 million annual subsidy company-wide. App., *infra,* at 79a. When Caterpillar rejected this and other demands, the union terminated the expired collective bargaining agreement and engaged in a strike that ended in April 1992 without resolution of the contract issues. *Id.* at 74a-75a.

On October 30, 1992, Caterpillar informed the UAW that, although it would continue to recognize the Committeemen as union officials, effective November 16, the company would no longer pay their wages and benefits—at least not until the parties reached a new, comprehensive labor agreement that provided for lawful payments. App., *infra, a*t 80a; Cir. App. at 135-36, 168-69.[3] The Committeemen at the York facility chose to return to active employee status, and the Chairman then went on *unpaid* union leave to continue his duties under a different provision of the expired collective bargaining agreement. Cir. App. at 471.

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merely accounted to the company for the time they claimed to have spent on union duties for which Caterpillar had agreed to pay, and if they were not going to perform those duties during a particular week, they simply notified the company of that fact. *Id.* at 161, 468, 619-24.

3 Although Caterpillar ceased paying full-time union representatives who performed no work for the company, it did not revoke its "no docking" policy. App., *infra,* at 80a. Under that long-standing company policy, *active* and full-time Caterpillar employees who also served as union stewards or part-time grievance committeemen could perform their union duties on an intermittent, *ad hoc* basis during working hours and then return to their regular jobs. They did not lose pay for reasonable time spent performing these union duties—hence, the name: "no docking" policy. *Id.* at 50a, 76a.

The union filed unfair labor practice charges challenging Caterpillar's termination of the payments. App., *infra,* at 50a-51a. Based on those charges, the General Counsel of the National Labor Relations Board issued complaints accusing Caterpillar, *inter alia,* of violating section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1994), by allegedly failing to bargain with the union before discontinuing its payments to the Committeemen. App., *infra,* at 51a. Caterpillar filed this action in the United States District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the payments violated section 302. *Id.*; Cir. App. at 83.[4] The court granted the union's motion for a stay in deference to the NLRB proceedings, Cir. App. at 111, and the Third Circuit affirmed, *id.* at 113.

On January 31, 1995, an NLRB administrative law judge issued a Decision and Recommended Order[5] dismissing the unfair labor practice complaints. App., *infra,* at 86a. The judge found that the Committeemen perform no productive work for Caterpillar in exchange for the payments and that Caterpillar has no control over the manner or means by which they perform their union duties. *Id.* at 78a. Describing them as the functional equivalents of "assistant business agents," *id.* at 76a, the judge further found that the Committeemen work for the union, are responsible only to the union for their work product, and answer only to the union, which determines their tenure, *id.* at 78a-79a. In light of those findings, the judge concluded that the payments violated sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), (b)(2) (1994), and surmised that they also "raise[d] a serious issue under Section 302." App., *infra,* at 81a.[6]

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4 The district court had jurisdiction under 28 U.S.C. §§ 1331 and 2201, as well as under section 302(e) of the Labor Management Relations Act, 29 U.S.C. § 186(e) (1994).

5 The decision is part of the record in this case because the union attached a copy of it as an exhibit to the union's amended answer. Cir. App. at 139-148.

6 Caterpillar had based its defense to the unfair labor practice complaint on, *inter alia,* sections 8(a)(3) and 8(b)(2). The company did not raise section 302 as a defense but reserved that issue for the district court, which had jurisdiction over section 302. Given his conclusions under sections 8(a)(3)

Although the union has appealed that decision to the National Labor Relations Board, the district court lifted its stay in this action. On December 8, 1995, the court granted Caterpillar's motion for summary judgment. App., *infra*, at 63a. The court held that providing wages and benefits to the Committeemen would violate section 302(a), which makes it unlawful for an employer to "pay . . . or agree to pay . . . any money or other thing of value" to the representatives of its employees, 29 U.S.C. § 186(a) (1994). App., *infra*, at 61a-62a.

In reaching that conclusion, the court rejected the union's contention that section 302(c)(1) exempted the wages and benefits at issue from the ban. That provision allows an employer to pay a union representative "who is also an *employee* or *former employee* of such employer, as compensation for, or by reason of, his *service as an employee* of such employer." 29 U.S.C. § 186(c)(1) (1994) (emphases added). The court held that the Committeemen were not current employees of Caterpillar, because the company exercised little control over them and received only indirect benefits from the performance of their duties. App., *infra*, at 59a, 60a. Following the Third Circuit's decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), the court also held that "[t]he record here is devoid of evidence that the [Committeemen]'s wages are for services rendered while [they were] employed by Caterpillar." App., *infra*, at 61a. Observing that the union's only argument was that *Trailways* had been wrongly decided, the court responded that "even if we were inclined to agree, *which we are not*, we are without power to overrule a decision of the Third Circuit." *Id.* at 61a n.15. (emphasis added).

The union appealed, and after oral argument before a panel of the Third Circuit, the full court *sua sponte* ordered a rehearing *en banc*. App., *infra*, at 47a. On March 4, 1997, a divided Third Circuit reversed the district court, overruled the applicable part

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and 8(b)(2), the administrative law judge found it unnecessary to rule on the section 302 issue, his jurisdiction over which was subject to dispute.

of *Trailways*, and held that the payments at issue would not violate section 302. *Id.* at 12a. Although the majority agreed that the Committeemen were not *current* employees of Caterpillar, *id.* at 7a, it held that the wages and benefits were payable "by reason of" their past service as employees and, as such, were exempt under section 302(c)(1), *id.* at 10a-11a. The majority's opinion turned on the fact that the payments were "bargained-for." *Id.* at 8a. The majority reasoned that

> every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.

Id. at 10a. The majority also opined that when Congress enacted section 302, it was concerned about only "bribery, extortion, and other corrupt practices conducted in secret." *Id.* at 12a. In contrast, the majority characterized the payments at issue as "innocuous." *Id.* at 8a.

There were two vigorous and wide-ranging dissents. In one of them, Judges Mansmann and Greenberg accused the majority of "plac[ing] its own policy objectives above plain language." App, *infra*, at 12a. Reading section 302(c)(1) as exempting only those payments made *in spite of*, not *because of*, a current or former employee's service as a union representative, *id.* at 14a-15a, the dissenters argued that wage payments to full-time union officials, like the payments at issue here, were "entirely unrelated" to the officials' past service as employees, *id.* at 15a. In addition, after reviewing the legislative history, the dissenters challenged the majority's understanding of Congress' purpose in enacting section 302. They contended that Congress "was concerned about *any* form of payment that could upset the balance between labor and management. *Id.* at 18a. Finally, after suggesting some practical difficulties with the majority's decision, Judges Mansmann and Greenberg criticized the majority for abandoning "the longstanding tradition of separation of labor and management." *Id.* at 30a.

Judge Alito filed a separate dissent. Among his numerous observations, he closely analyzed the language of section 302(c)(1) and criticized the majority for, in his view, construing the phrase "by reason of" to mean that a union representative's past service as an employee had to be merely a *but for* cause, rather than a *major* cause, of the payments at issue. App., *infra*, at 34a-35a.

Finally, all of the dissenters emphasized that they could find nothing in the statutory language or legislative history indicating that Congress had approved payments to full-time union officials simply because the payments are "bargained-for." App., *infra*, at 15a, 19a-20a, 34a, 43a.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal labor law that has vexed the lower courts but has never been addressed by this Court: May an employer pay or agree to pay the current benefits or, as here, the wages of full-time union officials who are the employer's former employees but who no longer perform any work for it? Sitting *en banc* below, a divided Third Circuit overruled its own precedent to approve that arrangement, even though section 302 of the Labor Management Relations Act broadly forbids an employer to "pay" or "agree to pay" the union representatives of its employees, 29 U.S.C. § 186(a) (1994). Payments are not unlawful, the majority held, if they are "bargained-for" and flow to union officials who once worked for the employer.

The unlikely foundation for that holding was section 302(c)(1), 29 U.S.C. § 186(c)(1) (1994), which accommodates union representatives who are regular workers. Under that provision an employer may pay a worker—notwithstanding her service as a *representative*—if the pay is owed "as compensation for, or by reason of," her past or present "service as an *employee*," 29 U.S.C. § 186(c)(1) (emphasis added). Despite this provision's common-sense purpose, recent attempts to interpret it have produced inter-circuit disagreement, if not disarray, demonstrating

that the lower courts need guidance in this confused but critical area of the law. Moreover, construing section 302(c)(1) to allow wage payments for work as a full-time union agent, as the majority below did, requires an unjustifiable leap and, at core, a fundamental change in the federal policy favoring labor-management independence. Now that one circuit has given its virtually unconditional imprimatur to such a change without even acknowledging the countervailing concerns voiced by the United States, the urgency for review is heightened—particularly since the very collaboration that gives rise to these agreements also prevents them from reaching this Court except on rare occasions like this one.

1. *The lower courts have proved incapable of achieving a consistent interpretation of section 302(c)(1).* Historically, courts have given the plain language of section 302 a straightforward interpretation.[7] Of particular relevance here, lower courts have repeatedly refused to accept labor's rationalization that section 302(c)(1) allows employers to pay full-time union representatives under the theory that the representatives are "employees." Although employers may indirectly benefit from the activities of union representatives, the lower courts are in agreement that those representatives are employees, not of the employer, but of the union, which primarily benefits from and controls their activities. *See Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 864-65 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *accord* App., *infra*, at 8a.[8]

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7 *See, e.g., Arroyo v. United States*, 359 U.S. 419, 424 (1959) (calling for "literal," "common-sense" construction); *United States v. Ryan*, 350 U.S. 299, 304-05 (1955) (holding section 302 should be construed broadly enough to accomplish its purposes).

8 Until recently, the only deviation from this holding involved very limited "no docking" policies applied to active employees. *See Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970) (upholding policy allowing attendance at monthly grievance meetings without loss of pay).

Achieving little success with this "employee" argument, labor has recently pressed a more elaborate "fringe benefit" theory. Under that theory, if a union representative is, or ever has been, an actual employee of an employer, then that employer may lawfully pay the representative for her union activities as a kind of fringe benefit payable "by reason of" her present or past "service as an employee," 29 U.S.C. § 186(c)(1).[9] This argument has left the lower courts in substantial disagreement, if not disarray. Beginning with *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), the six appellate decisions to consider this rationale[10] have produced no fewer than four different interpretations of the phrase "by reason of . . . service as an employee." The Third Circuit alone has propounded two, overruling *Trailways* to adopt its current view in this case.

In *Trailways*, the Third Circuit first confronted the union's fringe benefit argument and rejected it in favor of a straightforward interpretation of section 302(c)(1). The court held that an employer could not make pension contributions on behalf of individuals who had left its employ to become full-time union agents. The union argued that the contributions were payable to the agents "by reason of" their past service as employees because the agents would not have been eligible to receive the contributions *but for* that past service. *Id.* at 105. Rejecting that argument

9 At least until the present case, the circuits seemed to agree that the phrase "as compensation for . . . service" in section 302(c)(1) refers to wages, while the phrase "by reason of . . . service" refers to non-wage benefits. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046, 1049 (2d Cir. 1986).

10 This discussion excludes *Herrera v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996). In that terse decision, the Tenth Circuit upheld a "no docking" policy by simply adopting the analysis of the district court, which, in any event, provided no useful discussion of section 302(c)(1), *see, e.g., Herrera v. International Union, UAW*, 858 F. Supp. 1529, 1546 (D. Kan. 1994) ("[T]he law is clear that payments to union officials for time spent on union business does not violate [section 302].").

as a *non sequitur*,[11] *id.* at 106, the Third Circuit held that section 302(c)(1) allows payments to former employees only *in exchange for* "past services actually rendered by those former employees while they were employees of the company." *Id.* at 106 (emphasis omitted). Applying that test, the court concluded simply that the pension contributions at issue were in reality a form of remuneration for *present* services to the *union*, *see id.* at 106 & n.5, and, as such, were unlawful.

Almost simultaneously, the Second Circuit effectively embraced the dubious *but for* interpretation. In *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046 (2d Cir. 1986), the Second Circuit approved an extensive "no docking" scheme under which current employees who were also shop-floor union representatives could regularly devote up to four hours a day to union activities without losing any pay. The Second Circuit held that the *only* question was whether that policy applied to activities "engaged in by one who *is* a bona fide employee of the payor." *Id.* at 1049 (emphasis added). In other words, if one would not have been eligible to receive pay for union activities *but for* one's status as a *bona fide* employee, then the pay was available "by reason of . . . service as an employee."[12]

Although the "no docking" scheme did not give the Second Circuit an opportunity to consider how the *but for* test would apply if the wage payments were made to *former* employees,[13]

11 As one of the dissenters in the present case aptly observed, "it would be ridiculous to say that [Bill Clinton] became President 'by reason of' having attained his thirty-fifth birthday," simply because he would have been ineligible for the office *but for* having reached age 35. App., *infra*, at 35a (Alito, J., dissenting); *see* U.S. CONST. art. II, § 1, cl. 5.

12 That interpretation is untenable, for it renders the phrase "as compensation for, or by reason of . . . service as an employee" mere surplusage. The question under section 302(c)(1) is not whether the union representative being paid is also a current or former employee—*that is presumed*. The question is whether the pay is remuneration for services the representative rendered in an *employee* capacity or in a *union* capacity.

13 Because the case involved a "no docking" scheme, which the court expressly noted is, by its very nature, available only to current employees, the court

the court stressed that full-time pay to an individual who performed *no* services for an employer was not permissible:

> [W]e do not suggest that [section 302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work. Such an official would not be a bona fide "employee" within the meaning of the statute, and this would be precisely the kind of device that §§ 302(a) and (b) were designed to prevent.

Id. at 1050;[14] *accord NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986) ("A union official put on an employee payroll but assigned no meaningful work for the employer would not amount to a 'bona fide employee,' and payments to him would violate § 302.") (dictum).[15]

In considering a pension benefit scheme similar to that at issue in *Trailways*, the Seventh Circuit followed neither *Trailways* nor the *BASF* decisions but, instead, adopted a third interpretation. In *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989), the Seventh Circuit reviewed a policy retroactively granting pension credit to former employees for time during which they served as full-time union representatives. Although this *retroactive* credit necessarily could not have qualified

expressly reserved any questions concerning payments made to former employees. *See* 791 F.2d at 1049 n.1.

14 Although this strong note of caution indicates that the Second Circuit would not have extended its *but for* analysis to full-time union agents who happened to be former employees, one district court before the present case did precisely that. *See Communications Workers v. Bell Atlantic Network Serv.*, 670 F. Supp. 416, 419-20 (D.D.C. 1987). Dissenting in the present case, Judge Alito contended that the Third Circuit majority also adopted a *but for* test. App., *infra*, at 35a.

15 The Fifth Circuit rejected the employer's contention that it was not required to bargain with the union before unilaterally discontinuing a "no docking" policy because the policy violated section 302. In reaching that conclusion, the Fifth Circuit adopted the Second Circuit's reasoning in its *BASF* decision—including the *but for* test—with virtually no independent analysis. *See* 798 F.2d at 855-56.

under *Trailways* as payment offered *in exchange for* services as an employee, the Seventh Circuit refused to adopt that standard. Instead, the court held that the statute's "by reason of" language required simply that employer payments be "in some way *motivated by* past services." *Id.* at 1304 (emphasis added). The Seventh Circuit concluded that the employer's purposes in awarding the pension credits—to encourage the union to select the employer's workers as agents and to provide a "good will" gesture to those selected—were sufficiently related to the beneficiaries' past service to satisfy the "by reason of" requirement. *Id.* at 1301.

The Seventh Circuit realized, however, that its broad reading of the "by reason of" language threatened to overwhelm the ban on employer payments itself. *Id.* at 1304. To avoid that result, the court grafted some non-textual limitations onto section 302(c)(1). The Seventh Circuit held that payments to former employees are permissible only if they are "openly collectively bargained;"[16] are included in a "generally disseminated," "uniformly applicable," and "nondiscriminatory" collective bargaining agreement; are not "incommensurate" with the former employment; and are largely non-discretionary. *Id.* at 1304-05. Whether desirable or not, none of those restrictions are to be found anywhere in the text or legislative history of section 302.[17]

Even with this free-reining interpretation of section 302(c)(1), the Seventh Circuit nonetheless expressly disclaimed the legality of wage payments to full-time union agents who performed no work for an employer. Reinforcing the admonitions of the Second and Fifth Circuits that such payments would be illegal, the Seventh Circuit indicated that they would not be "commensurate" with past service and, therefore, could not "rea-

16 The Seventh Circuit concluded that the policy at issue in *Toth* was illegal because it had been implemented unilaterally, not collectively bargained. 883 F.2d at 1305.

17 Indeed, in seeking to achieve an acceptable "balance," the Seventh Circuit did not even attempt to conceal its raw policy judgment. *See* 883 F.2d at 1304-05.

sonably be said to be compensation 'by reason of' service as an employee." *Id.* (paraphrasing the Second Circuit's *BASF* opinion).

In the last appellate decision before the present case, the Eleventh Circuit adopted the *Trailways* interpretation. In *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), the Eleventh Circuit reviewed the same pension policy that had been at issue in *Toth* but did not embrace the Seventh Circuit's complex, non-textual construction of section 302(c)(1). Instead, the Eleventh Circuit utilized the *Trailways* standard.[18] It opined, however, that employer pension payments to a former employee would be permissible only if the employee's right to the payments *vested* before the end of her employment. *Id.* at 1575. Because the employer had instituted the *retroactive* pension policy at issue after the departure of its intended beneficiaries, the Eleventh Circuit held that it was unlawful. *Id.* at 1576.

Even though the Eleventh Circuit had rendered a persuasive opinion based on *Trailways*, a divided Third Circuit sitting *en banc* overruled the relevant portions of *Trailways* in the present case and adopted yet another interpretation of section 302(c)(1). In essence, the majority held that employer payments to a union representative who is a former employee are made "by reason of" the representative's past "service as an employee" whenever a collective bargaining agreement provides for the payments. *See* App., *infra*, at 11a-12a. Building on its view that any benefit in a labor contract is, *ipso facto*, part of the consideration for an individual's service as an employee, the majority reasoned that

18 The Eleventh Circuit upheld a jury instruction that had been drawn verbatim from language in *Trailways* that the Seventh Circuit had expressly repudiated. *Compare Trailways*, 785 F.2d at 106 ("[T]he statute contemplates payments to former employees for past services actually rendered by those former employees while they were employees of the company." (emphasis omitted)) *with Phillips*, 19 F.3d at 1574 (quoting jury instruction that construed section 302(c)(1) to apply "'only to payments by an employer to a former employee for past services actually rendered by those former employees while they were employees of the employer company'" (emphasis omitted)).

a contractual provision authorizing employer payments to full-time union representatives renders those payments consideration owed "by reason of . . . service as an employee." *Id.* at 10a-11a. Although the payments at issue flowed to *former* employees who were no longer covered by the labor contract, the majority accounted for that problematic fact by hypothesizing an implicit compact by which each employee, while still an employee, allegedly agreed to forgo "a small amount in current wages in exchange for a promise that, if he or she should *someday* be elected grievance chairperson, [the employer] would continue to pay his or her salary." *Id.* at 10a (emphasis added). Thus, under the majority's elaborate construct,[19] an employer's payment of wages to a full-time union representative for an indefinite period of time supposedly constitutes the fulfillment of some option that each employee implicitly purchases with an unspecified but presumed reduction in the level of wages she might otherwise receive.

The majority's focus on the collective bargaining process in applying section 302(c)(1) recalls the Seventh Circuit's approach in *Toth*—but not in one crucial respect. Apart from the requirement of "bargaining," the Third Circuit majority jettisoned all the non-textual limitations that the Seventh Circuit—devised to prevent section 302(c)(1) from overwhelming the prohibition on employer payments where a union agent happens to be a former employee. Nothing in the opinion of the majority below even hints that the amount of pay to a union agent must be commensurate with past service; that the payments must be included in a generally disseminated, uniformly applicable, and nondiscriminatory collective bargaining agreement; or that the provision of payments must be non-discretionary. Although the Third Circuit majority may be somewhat less vulnerable to the charge of judicial legislation than the Seventh Circuit, the majority's decision below simply defers to the collective bargaining process and

19 The majority conjured this supposed agreement out of thin air. Absolutely nothing in the record even hinted at the existence of such a deal, and the majority did not pretend that anything did.

drains section 302(c)(1) of virtually any substantive content. It places no *a priori* restrictions on the types of payments that an employer and a union may agree to characterize as payable "by reason of" past service, as long as the recipient has some period of prior employment with the payor.[20]

Indeed, the United States, as *amicus curiae* below, keenly perceived the danger inherent in such an unfettered deference to collective bargaining. Although the Government sought reversal of the district court's ruling in this case, it urged a remand, so that the court could apply a number of *Toth*-like limitations. Like the Seventh Circuit, the United States was concerned about cases in which payments were "'clearly so incommensurate with [a union representative's] former employment as not to qualify as payments "in [*sic*] compensation for or by reason of" that employment.'" Amend. Br. for the United States as Amicus Curiae at 27 (quoting *Toth*, 883 F.2d at 1305). In addition, the United States suggested it was relevant whether the paid union representative happens to be an individual who had "worked in the

20 This reasoning injects an intolerable circularity into section 302. While section 302(a) prohibits an employer from "agree[ing] to pay" union representatives, the majority's interpretation of section 302(c)(1) exempts from that prohibition payments to a union agent that an employer has *agreed to pay*. Thus, as long as a union agent is a former employee, section 302(a) would prohibit an employer from agreeing to pay only that which he has not agreed to pay.

The reasoning also sets up an utterly irrational distinction. By allowing payments to union representatives who were former employees but not to those who were never employees of the payor, the decision below suggests that past service as an employee somehow makes a union representative less susceptible to the kind of influence against which section 302 is directed. The irrationality of that distinction may lure lower courts into taking the small additional step of holding that an employer may lawfully pay the wages of full-time union representatives who were *never* its employees. If, as the majority held below, the payments at issue were purchased by employees as consideration for their services, one could easily extend the logic and characterize wage payments to a union representative who was never an employee as simply the employer's provision of a fringe benefit to its employees (*i.e.*, "free union representation") payable indirectly to (and implicitly purchased by) its current employees.

bargaining unit" and had been "elected to his position by his fellow employees" and is receiving pay that is "dependent on and limited to [the representative's] continuing role in the grievance process." *Id.* at 24. Finally, the United States called for courts to "closely scrutinize[]" cases in which the payments are made "to an individual who negotiates the terms of those payments" or "to an individual who has not worked for the company in his regular job for an extended period" and "is unlikely to return to such work." *Id.* at 28.[21] Although the petitioner agrees with Judge Alito below that none of these requirements can be "tease[d]" from the language of section 302(c)(1), App., *infra*, at 44a n.6, they do vividly anticipate the mischief that the Third Circuit, by rejecting these and the Seventh Circuit's limiting principles, could unleash.

Furthermore, the decision below does not merely contradict *Toth* by disregarding its non-textual provisos. In the name of a newfound faith in the ability of employers, unions, and member-employees to self-regulate potentially corruptive practices through collective bargaining, the majority disregarded *Bechtel's* insistence that the union recipient be providing services to the employer as an employee. The majority also abandoned *Trailways'* requirement that employees or former employees be paid only *in exchange for* actual services rendered to the employer. The majority similarly discarded the requirement of the *BASF* decisions that union recipients of employer payments be *current bona fide employees* of the employer. And most troubling of all, the majority ignored the expressed concerns of other courts about *wage* payments to *full-time* union representatives. The Second, Fifth, and Seventh Circuits have strongly indicated that such payments are unlawful,[22] and the Sixth Circuit, in its *Bechtel* deci-

21 In fact, each of those scenarios is present in this very case, *see supra* note 1 & pp. 3-4.

22 Indeed, even in the Third Circuit views are sharply split, as the decisions in *Trailways* and the present case demonstrate. If one considers the opinions of both the district and appellate courts in those two cases, nine judges have found payments lawful, while seven have concluded they are unlawful. *Compare* App., *infra*, at 1a (opinion of Nygaard, J., joined by Sloviter, C.J.,

sion, gave no hint that its view of the legality of employer wage payments at issue there turned on the status of a union representative as a former employee.[23] Dismissing these warnings, the majority below made the Third Circuit the first ever to approve a scheme whereby employers may pay full-time salaries—apparently at whatever levels negotiations will bear—to full-time union representatives who do absolutely no work for the employer.

A decade after the debut of labor's fringe benefit argument, the circuits are fragmented with no resolution in sight, and the meaning of section 302(c)(1) is more muddled than ever. Indeed, there are no fewer than four established interpretations of the phrase "by reason of . . . service as an employee." The Third Circuit says it means whatever the parties say it means through collective bargaining, while the Seventh Circuit, though also favoring the idea of bargaining, contends that the payments must be "motivated by" past service and imposes a laundry list of substantive regulations that the court simply manufactured. The Second and Fifth Circuits, in contrast, have read the phrase "by reason of" as synonymous with *but for* causation. And the Eleventh Circuit has imported the Third Circuit's late *Trailways* standard, requiring that remuneration be part of a payment for the actual rendition services as an employee. Therefore, a decade's

and Becker, Stapleton, Scirica, Cowen, Roth, Lewis, and McKee, JJ., holding payments lawful) *and Trailways*, 785 F.2d at 108 (Becker, J., dissenting) *with* App., *infra*, at 12a (Mansmann, J., joined by Greenberg, J., dissenting); *id.* at 30a (Alito, J., dissenting); *id.* at 49a (opinion of Caldwell, J., holding payments unlawful); *Trailways*, 785 F.2d at 102 (opinion of Garth, J., joined by Van Dusen, J., holding payments unlawful); *and Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 121 L.R.R.M. (BNA) 3160, No. 84-4703 (E.D. Pa. Feb. 13, 1985) (opinion of Weiner, J., holding payments unlawful).

23 Under the scheme at issue in *Bechtel*, members of an employers' association were required to contribute to a trust fund to pay the salary of an industry steward. In all likelihood, the steward would have been a former employee of at least one of the employers in the employers' association, *see infra* note 30, but the opinions of neither the Sixth Circuit nor the district court—both holding the payments unlawful—provide any clue about the current steward's employment history. *See Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258 (6th Cir. 1981), *aff'g* 463 F. Supp. 643 (E.D. Mich. 1978).

experience shows that, far from providing "a closer working out" of the issues, *American Airlines, Inc. v. Wolens*, 513 U.S. 219, ___, 115 S. Ct. 817, 827 (1995) (internal quotation marks omitted), the circuits are struggling at such cross-purposes that they are now further than ever from agreeing on an underlying theory of section 302(c)(1). The present case presents this Court with an excellent opportunity to provide the kind of basic guidance that will fundamentally orient the lower courts in a consistent direction and facilitate the further development of the law in this area.

2. *The decision below introduces a fundamental change in federal labor policy that should be left to Congress.* The Third Circuit's unlimited bargaining interpretation of section 302(c)(1) significantly alters a fundamental premise of federal labor policy: the independence of labor from management. By giving employers and union negotiators virtually *carte blanche* to authorize employer payments to union representatives who are former employees, the Third Circuit has breached the policy of financial self-reliance that was designed not only to prohibit intentional acts of bribery, but also, at least in part, to prevent unions from developing addictions to employer subsidies. Indeed, the majority below went so far as to allow an employer to pay the very *wages* of full-time union agents. Whether this substantial "blur[ring of] the important line between labor and management" is desirable, App., *infra*, at 29a (Mansmann, J., dissenting), such a major change in policy should be left to Congress.

The idea that unions should be independent of employers is pervasive in federal labor law. From early resistance to employer-dominated "company unions," *see, e.g., Newport News Shipbuilding & Drydock Co. v. NLRB*, 308 U.S. 241 (1939), to recent controversies over joint labor-management committees, *see, e.g., Electromation, Inc.*, 309 NLRB 990 (1993), *enf'd*, 35 F.3d 1148 (7th Cir. 1994), the premise that labor should remain free from undue influence by management has been a constant.[24]

24 In fact, in construing section 302(c)(5) in *Trailways*, the Third Circuit noted

Congress has even made a variation on the policy explicit in section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2), by forbidding employers to "dominate," "interfere with," or "contribute financial support" to unions. As Justice Powell observed in *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981), this principle of labor independence is "fundamental to the industrial philosophy of the labor laws in this country." *Id.* at 193 (concurring in part and dissenting in part); *see also* App., *infra*, at 29a (Mansmann, J. dissenting).

Section 302 implements this principle of labor-management independence by forbidding employer payments to union representatives. Although the majority below assumed Congress was concerned about only "bribery, extortion and other corrupt practices *conducted in secret*," App., *infra*, at 12a (emphasis added), Judge Mansmann correctly pointed out that section 302 sweeps much more broadly than the majority suggested: "Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management." *Id.* at 18a (dissenting opinion). In fact, section 302 is a broad conflict-of-interest statute, *Phillips*, 19 F.3d at 1574—a "prophylactic" measure, *Costello v. Lipsitz*, 547 F.2d 1267, 1273 (5th Cir.), *cert. denied*, 434 U.S. 829 (1977).[25] It maintains the independence of labor by forbidding even "innocuous" employer payments, App., *infra*, at 8a, that could be corrosive over time.[26]

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the "inherently adversarial relationship" between labor and management. 785 F.2d at 108.

25 For instance, Congress did not enact section 302 merely "to duplicate state criminal laws" banning bribery and extortion, *Arroyo v. United States*, 359 U.S. 419, 425 (1959), with their requisite element of scienter, *United States v. Ryan*, 350 U.S. 299, 305 (1956) ("As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative."); *see also United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973) (holding Section 302 did not require showing of "corrupt purpose"); *United States v. Gibas*, 300 F.2d 836, 840 (7th Cir.) (same), *cert. denied*, 371 U.S. 817 (1962).

26 As the Third Circuit itself previously observed in *Trailways*, payments made to union representatives who are former employees "may not at first blush

Although the majority below based its interpretation of section 302(c)(1) on the premise that "bargained-for" employer payments were consistent with congressional policy underlying section 302, App., *infra*, at 8a, that premise is flawed. Section 302 generated intense debate in Congress[27]—and *not* because it simply banned bribery and extortion. The measure stirred passions precisely because it placed substantive limits on the terms that employers and union negotiators could *agree to include* in a collective bargaining agreement.[28] Opponents vigorously decried section 302 as interfering with free collective bargaining.[29] Indeed, section 302(a) expressly provides that an employer may not "*agree* to pay" a union representative. 29 U.S.C. § 186(a) (emphasis added). Congress manifestly intended to protect union

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be the kinds of payments thought to lead to corruption of union officials, *the potential for such corruption*, or at least the appearance of it, nevertheless *remains*." 785 F.2d at 108 (emphases added).

27 *See, e.g.*, 93 CONG. REC. 4883 (1947) (colloquy between Sens. Ball and Barkley), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1321-22 (1985) [hereinafter LEG. HIST.].

28 Senator Taft, who led the movement to enact the Labor Management Relations Act in 1947, insisted that "certainly there should be some restriction on the right of those who bargain collectively for the employees . . . as to how far they can take the money earned by the employees and use it for union purposes without restriction." 93 CONG. REC. 4876 (statement of Sen. Taft), *reprinted in* 2 LEG. HIST. at 1311.

Furthermore, in stark contrast to the Third Circuit's theory that employer payments are permissible *when* they are bargained in exchange for reduced current wages, the sponsor of the amendment that became section 302 expressed his outrage that in some instances "unions have even relinquished *wage demands* in order to secure" a particular form of employer payment. 93 CONG. REC. 4805 (statement of Sen. Ball) (emphasis added), *reprinted in* 2 LEG. HIST. at 1305.

29 For instance, as one opponent of section 302 put it, "[t]his is another one of those instances where it seems that certain individuals do not credit the union membership with any authority whatever over the selection of or the conduct of their own leaders." 93 CONG. REC. 4806 (statement of Sen. Pepper), reprinted in 2 LEG. HIST. at 1306.

members from certain arrangements that their own leaders might negotiate with their employers.

The Third Circuit majority's unlimited bargaining interpretation of section 302(c)(1), however, allows the very type of agreement between labor officials and management that Congress intended to outlaw. The majority has all but eviscerated the prohibition of section 302 by allowing labor and management to collectively bargain around its restrictions. An employer and a union can strike a deal to pay the salary of a union official, regardless of rank or function and, apparently, need only point to some period of employment with the payor, however brief, in order to thread the deal through section 302(c)(1). If this precedent is allowed to take root, unions and employers will have tremendous discretion to make unions financially dependent on employers and, conversely, allow employers to gain financial leverage over unions.[30]

A majority of the judges sitting on the Third Circuit would apparently implement this dramatic change in labor policy in hopes of fostering greater labor-management "cooperation." But this kind of radical revision of the sixty-year-old principle of labor-management independence should be left to the judgment of Congress, which has shown that it is ready to amend section 302 when the need arises and a consensus coalesces. Since Congress enacted section 302 in 1947, it has added four additional exceptions to the prohibition on employer payments to union representatives. *See* 29 U.S.C. § 186(c)(6)–(9) (1994). Indeed, in 1978 Congress even amended section 302 to sanction some *specified* forms of labor-management *cooperation*. *See* Labor Management Cooperation Act of 1978, Pub. L. No. 95-524, 92 Stat. 1909; *BASF*, 791 F.2d at 1053 (discussing amendment). History

30 Salaries of staff personnel and officials are obviously a union's major expense. In most labor organizations, virtually all union officials are initially drawn from some employer's work force. The Third Circuit's decision allows funding the salaries of union officials, whether local or international, elected or appointed, for months, years, or even decades, regardless of how long or brief the officials' shop floor service.

also shows, however, that such amendments often involve highly contentious value judgments and political compromises best left to the legislative process.[31] Judge Mansmann struck the proper judicial chord below:

> I applaud labor-management efforts to retreat from the adversarial approach that has often marred the labor landscape in this country. I believe, however, that the payments sanctioned by the majority go too far. The financial support sought by the United Auto Workers in this case contravenes the long-standing tradition of separation of labor and management. . . . It is for Congress, not the courts, to determine if and when to permit labor organizations and employers to blur the line between them.

App., *infra*, at 30a (dissenting opinion).

A more practical reason for leaving such major policy changes to Congress is that such changes must be woven into the broader fabric of labor law. Here, for example, the majority has created a new conflict within federal labor policy. As noted previously, the majority justified its holding below by supposing that each employee had implicitly accepted a wage reduction in exchange for a contingent right to wages should any of them ever *someday* become a union representative. But this assumed

31 *See, e.g.*, Teamwork for Employees and Managers Act, S. 295, 105th Cong., 1st Sess. (1997) [hereinafter "TEAM Act"]; S. Rep. No. 105-12, 105th Cong., 1st Sess., 1997 WL 159793 (Leg. Hist.) at *53 (April 2, 1997) (minority views) ("[T]he Committee has voted along party lines to report this bill, whose sole purpose is to make company-dominated forms of employee representation lawful."); President Clinton, *Remarks to the United Steel Workers Convention*, 32 Weekly Comp. Pres. Doc. 1423 (1996) ("The Congress tried to make company unions the law of the land, and I wouldn't let them do that . . . . I vetoed the TEAM Act.") (describing prior version of TEAM Act); H.R. Rep. No. 245, 80th Cong., 1st Sess. at 85 (1947) (minority views) (A joint labor-management committee "could only be the nucleus for a company-dominated organization. It is the beginning of the imposition on employees of many employers' desire for a subservient labor organization."), *reprinted in* 1 Leg. Hist. at 376.

trade, if it ever really happened, contradicts the statutory right of an employee to *refrain* from union membership. Under the majority's theory, a union and its members may effectively force non-members—who are not even be entitled to vote on the collective bargaining agreement—to fund the salaries of union officers by way of reduced wages borne by all employees rather than through the dues of those who choose to join the union. The decision thus threatens to drive truly open shops into irrelevance, if not extinction, and nullify state "right to work" laws that guarantee non-union workers the right to shield their hard-earned money from union tax collectors. *See Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963) (holding section 14(b) of National Labor Relations Act, 29 U.S.C. § 164(b) (1994), gives states power to prohibit so-called "agency shops"). Resolution of that conflict—or, more correctly, whether to create it in the first place—should be left to the political judgment of Congress.

3. *This Court should review the judgment of the Third Circuit because silent collaboration between employers and unions offers only rare opportunities to review this issue.* If this Court does not review the judgment of the Third Circuit in this case, it may be many years before another opportunity will present itself precisely because the kind of financial arrangements at issue here have no "natural enemy." They usually result from collaboration between union officials and employers. Unions enjoy the income they receive from these deals,[32] and companies are drawn to the leverage they believe they gain in the bargain.[33] As a result, when these arrangements do come to light, it is often in extreme cases that do not present courts with the kind of straightforward

32 Here, that income had grown to $2 million per year and, at the time the company finally cried foul, the union was demanding still more. App., *infra*, at 79a.

33 Companies presumably like the peace such financing buys and the leverage and pressure point it affords. As Judge Alito pointed out in dissent below, this case arose because the company cut off the payments in order to place economic pressure upon the union leadership in a labor contract dispute, and the union initiated proceedings to force continued payments. App., *infra*, at 43a.

opportunity that is available in this case to interpret section 302. *Toth* and *Phillips*, for instance, involved the same scheme, which so approached outright bribery that federal prosecutors obtained criminal convictions in the matter. *See Phillips*, 19 F.3d at 1567-73 (describing scheme).[34]

Furthermore, the law cannot depend solely on "rank-and-file" employees to enforce the requirements of section 302. Neither the union member[35] nor his non-member co-worker—both of whom section 302 was designed to protect—may even be aware of the concessions union negotiators offered in order to secure wage payments for full-time union officials. In fact, contrary to the apparent assumption of the majority below, App., *infra*, at 12a, non-member employees generally cannot vote on whether to ratify their bargaining unit's collective bargaining agreement, and nothing in federal labor law provides even union members with a right to vote on ratification. *See, e.g., Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1111 (6th Cir. 1986) (*en banc*) ("A collective bargaining agreement must be ratified by a union's membership *only if* the union's constitution, by-laws or rules and regulations create such a requirement. *There is no independent requirement in federal law of ratification by a union.*" (internal quotation marks omitted; emphases added)), *cert. denied*, 479 U.S. 1086 (1987); *accord American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1101 (D.C. Cir. 1981). Indeed, collective bargaining agreements are frequently long-term,[36] complex documents that sometimes

34 Since the *BASF* cases both involved "no docking" rules, rather than wage payments to full-time union representatives, only one appellate case has come close to presenting that issue cleanly, and it was *Trailways*, decided over ten years ago. Indeed, even *Trailways* involved the payments of only pension contributions.

35 Even union members are likely to vote their short-term economic interests as they lower their dues and pass the cost of their organization on to their employer and, ultimately, all employees, whether members of the union or not.

36 For example, the recent Steelworker-Goodyear national agreement will run

run into the hundreds of pages.[37] A clause providing employer payments to full-time union representatives could remain buried in such an agreement, implemented without question for long periods of time.

Before the decision below opens the floodgates so that a torrent of new wage, salary, and other so-called "fringe benefits" for full-time union officials can surge through section 302(c)(1), this Court should make absolutely certain that the majority's unlimited bargaining interpretation is a sound one. If it is not, but that conclusion becomes clear only later, there will be quite a mess to mop up.

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for approximately six years. Chris Adams, *Goodyear, Steelworkers Sign Contract that Each Side Can Call a Triumph*, WALL ST. J., May 12, 1997, at B11.

37 Here, the contract had twenty-one articles, one hundred and sixty sections, and thirty side letters of agreement *plus* pension, health insurance, life insurance, sickness and accident insurance, supplemental unemployment insurance, legal services, and numerous other benefit plan documents. *See* Central Agreement between Caterpillar Inc. and the UAW and Local Supplement for the York Plant and Local Union 786 (Oct. 21, 1988) (part of record below).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 1997

Appendix

Filed March 4, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation doing business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and its affiliated LOCAL UNION 786,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 92-01854)

Argued August 8, 1996

Before: NYGAARD, LEWIS and McKEE, *Circuit Judges.*

Reargued December 2, 1996

Before: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, *Circuit Judges.*

(Opinion filed March 4, 1997)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

In this appeal, we must decide whether an employer granting paid leaves of absence to employees who then become the union's full-time grievance chairmen violates § 302 of the Labor Management Relations Act, 29 U.S.C. § 186. The district court held that this practice is illegal, relying on our decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101 (3d Cir. 1986). We will reverse, and in doing so, overrule significant portions of *Trailways*.

I.

The facts are stated comprehensively in the district court's opinion, *Caterpillar, Inc. v. International Union, United Automobile Workers*, 909 F. Supp. 254 (M.D. Pa. 1995). For our pur-

poses it suffices to recount that the United Auto Workers, its Local 786 and Caterpillar have been parties to a collective bargaining agreement since 1954. Until 1973, the agreement contained a "no-docking" provision allowing employees who were also union stewards and committeemen to devote part of their work days to processing employee grievances without losing pay, benefits or full-time status. In 1973, this agreement was expanded to allow the union's full-time union committeemen and grievance chairmen to devote their entire work week to union business without losing pay. These employees are placed on leave of absence and are paid at the same rate as when they last worked on the factory floor. They conduct that business from the union hall, perform no duties directly for Caterpillar, and are not under the control of Caterpillar except for time-reporting purposes.

In 1991, a nationwide labor dispute erupted between Caterpillar and the union, which resulted in the employees returning to work without a contract. A year later, Caterpillar unilaterally informed the union that it would cease paying the grievance chairmen and questioned the legality of such payments, notwithstanding that it had paid them without complaint for eighteen years. The union filed an unfair labor practice charge with the National Labor Relations Board, alleging that, by unilaterally rescinding the payments, Caterpillar refused to bargain in good faith. A month later, Caterpillar filed this suit seeking a declaratory judgment that those payments violate § 302 of the LMRA.

The district court stayed its proceedings pending the decision of the NLRB. An administrative law judge later issued a recommended decision and order dismissing the union's charges, finding that the payments violated § 8 of the National Labor Relations Act.[1] The district court then lifted the stay and held that Caterpillar's payments to the union's full-time grievance chairmen violated § 302. The union now appeals.

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1 The ALJ, while questioning the validity of the payments under § 302 of the LMRA, did not reach that issue in his proposed holding.

II.

A.

Section 302(a) of the LMRA provides:

> It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1)to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2)to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce[.]

29 U.S.C. § 186(a). Caterpillar is an employer in an industry that affects commerce and the grievance chairmen are representatives of Caterpillar's employees. On the face of § 302(a), then, Caterpillar's wage payments to them would appear to be unlawful. Section 302(c), however, provides that

> [t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer . . . to any representative of his employees, . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer[.]

29 U.S.C. § 186(c)(1). Thus, if the grievance chairmen receive their compensation "by reason of" their "service as employees," then Caterpillar's wage payments are lawful.

In *Trailways*, the employer agreed to continue making contributions to a joint union-management trust fund on behalf of employees who had taken leaves of absence to devote their time to full-time union positions.[2] There, the union argued that those

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2 One issue before the court was whether the payments were lawful under § 302(c)(5), which grants an exception for payments to pension trust funds.

payments could pass muster under § 302(c)(1), which permits payments to former employees "as compensation for, or by reason of, [their] service as . . . employee[s.]" The *Trailways* court rejected that possibility as a matter of statutory construction, opining:

> To the Union, the pension fund contributions made on behalf of former employees currently on leave to serve as union officials were earned solely "by reason" of their past service to Trailways. But for their past employment by Trailways, the Union contends, these officials would not be eligible for pension fund contributions; therefore, these payments are "by reason of their service as an employee of" Trailways.
>
> A logical reading of the statute makes clear that the "payments to former employees' exemption" of § 302(c)(1) applies solely to payments made as "compensation or by reason of" the former employees *past* service to the employer. While the Union is correct in asserting that had these individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways pursuant to the collective bargaining agreement were made "in compensation for, or by reason of," their *former* service to Trailways so as to fall within the § 302(c)(1) exception. Clearly, the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company*. Just as clearly, however, the pension fund benefits paid on behalf of former employees serving as union officials while on leave

The *Trailways* court concluded, however, that the § 302(c)(5) exception applies only to current employees and held that the union officials did not fit that description because Trailways did not have sufficient control over their work and because their work was solely for the benefit of the union. 785 F.2d at 104-07.

> from Trailways are not compensation for their past service to Trailways.
>
> *Id.* at 105-06 (emphasis in original).[3]

Were we to follow *Trailways*, its holding would control our decision in this case. The grievance chairmen cannot be considered current employees of Caterpillar who are being compensated for their current services. The chairmen perform no services directly for Caterpillar. Instead, they handle grievances and other labor matters for the union, a situation that often places them in a position adverse to Caterpillar's. Section 302(c)(1) legalizes payments to current or former employees based on their "services" as employees, not their "status" as such. Thus, the mere fact that the chairmen remain on the Caterpillar payroll and fill out the appropriate forms and time sheets to get paid is legally irrelevant.

The union argues that, unlike the situation under subsection (c)(5) in *Trailways*, under subsection (c)(1) the chairmen can be employees of both the union and the employer. It relies especially on *NLRB v. Town & Country Electric*, 116 S. Ct. 450, 456 (1995), in which the Supreme Court held that a paid union organizer who obtained a job in order to "salt" the workforce and organize for the union was still an employee within the meaning of the National Labor Relations Act. But there, the Court noted that the employee still performed services for the benefit and under the control of the employer, even though part of his time was spent organizing for the union. That situation is different from ours. Here the chairmen do nothing for Caterpillar's benefit.

Moreover, under *Trailways* we cannot conclude that the chairmen's salaries were payments to former employees "as compensation for" their past services as employees. The chairmen were already compensated for their production line work long

3 In a footnote, the court noted that the pension contributions were based on the employees' current union salary, indicating that the payments were "geared to their contemporaneous services to the Union." *Id.* at 106 n.5 (emphasis deleted).

ago in the form of wages and vested benefits. A fair reading of *Trailways* does not support a finding that the payments at issue here somehow "related back" to these former employees' services on the factory floor.

B.

Nevertheless, after careful consideration and reargument before the *in banc* court, we believe that *Trailways* was wrongly decided and tends to subject innocuous, bargained-for and fully disclosed payments to the criminal sanctions of the LMRA.

We have no difficulty with the *Trailways* holding regarding "current employee" status. *See* 785 F.2d at 106-07. We also believe that the salary payments to these union officials were not in compensation for their past services rendered as production employees. Our disagreement is with the *Trailways* court's conclusion that the "by reason of" language in § 302(c)(1) exempts only those payments for past services actually rendered while the former employee was still employed by the company. We think that statement misinterprets the text of § 302(c)(1) and does nothing to further the policy objectives Congress had when it enacted the LMRA half a century ago.

The *Trailways* test would be quite appropriate if § 302(c)(1) referred only to payments as *compensation for* past services. It is difficult indeed to comprehend how years, even decades, of paid union leave can realistically be thought of as compensation for time spent on the factory floor. The *Trailways* court, however, applied the same test to the statute's "by reason of" language; with that we can no longer agree.

First of all, Congress chose specifically to exempt payments in "compensation for" *or* "by reason of" an employee's service. By so doing, it must be presumed to have intended that certain payments would be legal, even though they were not, as *Trailways* recites, "for past services actually rendered by those former employees while they were employees of the company." *Id.* at 106 (emphasis deleted). Nevertheless, the *Trailways* court, without any explanation, conflated the two phrases and developed a

unitary test for whether former employee compensation is permissible.

Under the *Trailways* test, there are three requirements for a "former employee" payment to qualify for the § 302(c)(1) exemption:

(1) It must be for past, not present, services;

(2) the services must be actually rendered; and

(3) the services must have been rendered while the payee was still an employee.

Under this standard, the chairmen's wages fail the *Trailways* test, because the payments are not for services actually rendered to the company while they were still employees. Indeed, under *Trailways*, it appears that pay or continuation of benefits for time spent serving on a jury or in the National Guard would be illegal.

Likewise, even the "no docking" provisions of many collective bargaining agreements, including the Caterpillar-UAW contract here, fail to meet the *Trailways* standard. Under a no-docking clause, the employer agrees that shop stewards may leave their assigned work areas for portions of a day to process employee grievances without loss of pay. By paying production workers for the part-time hours when they leave their regular duties, the company is paying for services not actually rendered for it, since those employees are already receiving their regular hourly wages and benefits for their production line work. Yet, no-docking arrangements have been consistently upheld by the courts as not in violation of § 302, *see NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 854-56 (5th Cir. 1986); *BASF Wyandotte Corp. v. Local* 227, 791 F.2d 1046 (2d Cir. 1986); *Herrera v. International Union, UAW*, 73 F.3d 1056 (10th Cir. 1996), *aff'g & adopting dist. ct. analysis*, 858 F. Supp. 1529, 1546 (D. Kan. 1994); *Communications Workers v. Bell Atlantic Network Servs., Inc.*, 670 F. Supp. 416, 423-24 (D.D.C. 1987); *Employees' Independent Union v. Wyman Gordon Co.*, 314 F. Supp. 458, 461 (N.D. Ill. 1970), and Caterpillar does not even seek to have the contract's no-docking clause declared illegal. Moreover, as the

union points out, it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime.

We believe that the payments at issue here, while they were not compensation for hours worked in the past, certainly were "by reason of" that service. We reach this conclusion because the payments arose, not out of some "back-door deal" with the union, but out of the collective bargaining agreement itself. Caterpillar was willing to put that costly benefit on the table, which strongly implies that the employees had to give up something in the bargaining process that they otherwise could have received. Thus, every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary.[4] As our colleague Judge Becker pointed out, dissenting in *Trailways*:

> The collective bargaining agreement contains the terms of workers' employment with Trailways; each of the benefits the workers receive under that collective bargaining agreement are part of the consideration for their services at Trailways. In addition to the standard terms for wages, overtime pay, and insurance, the collective bargaining agreement provides that persons who take a leave of absence to work as union officials have a right to reinstatement at Trailways after their union service and retain their seniority during their absence. The collective bargaining agreement also provides that the employer will make payments into the union's pension fund while the employee is on leave. Although these contributions are made during the leaves of absence, the employer's promise to pay them is nonetheless a term of the collective bargaining agreement and therefore a part of the consideration for work per formed as a Trailways employee. There is no reason for distinguishing the pension fund payments from any of the other terms of the collective bargaining agreement. Like wages, overtime, insurance, or accrued seniority, the pension fund payments are consideration for services rendered and, as such, are permissible under § 302(c)(1).

Trailways, 785 F.2d at 109 (Becker, J., dissenting).

We find this line of reasoning persuasive. Indeed, it has been taken by a number of decisions reached after *Trailways*. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) (§ 302(c)(1) satisfied when former employee's entitlement to payments vests *before* he or she goes out on leave, but not after); *Toth v. USX Corp.*, 883 F.2d 1297, 1301-04 (7th Cir. 1989) (criticizing *Trailways* and opining that "[o]ne obvious instance in which continuing payments constitute recompense for past services is when those continuing payments were bargained for and formed part of a collective bargaining agreement."); *IBEW v. National Fuel Gas Dist. Corp.*, 16 Employee Benefits Cases 2018, 2020-21 (W.D.N.Y. 1993) (same); *Bell Atlantic*, 670 F. Supp. at 421-22 (same). We are aware of no currently valid opinion that follows the *Trailways* holding.

Caterpillar maintains that, under the reasoning we have utilized, employers and unions can themselves decide what is legal regardless of federal law by agreeing in a labor contract to a particular course of conduct. Our point, however, is not that a collective bargaining agreement can immunize unlawful conduct, but that: (1) under § 302(c)(1), the lawfulness of the conduct *ab initio* turns on whether the payment is "owed because of . . . service as an employee"; and (2) what is "owed" depends on the terms of the contract. Put differently, the contract does not immunize otherwise unlawful subjects but, by defining the basis for the payments, speaks directly to the question posed by the statute

4 We do not mean to imply that an employee hired after a collective bargaining agreement could not be elected chairperson because he or she never "agreed" to an implicit wage reduction. Rather, like any other term of a labor agreement, it would be binding on all employees, whenever hired, until the expiration of the contract.

as to whether the payments are "compensation for, or by reason of . . . service as an employee."

We also believe that any attempt to distinguish "no docking" provisions from the payments at issue here is unpersuasive. We perceive no distinction between union officials who spend part of their time (which may be quite substantial) in adjusting grievances from the type of employees who are involved here. Instead, "the nature of the absences and the payments made by the employer owning them is the same." *Trailways*, 785 F.2d at 111.

III.

In sum, we simply do not view the payments at issue here as posing the kind of harm to the collective bargaining process that Congress contemplated when it enacted the LMRA. Section 302 of that statute was passed to address bribery, extortion and other corrupt practices conducted in secret. *See Trailways*, 785 F.2d at 110 (Becker, J., dissenting). These expanded "no-docking" provisions, in contrast, are contained in the collective bargaining agreement on which each rank-and-file employee has the opportunity to vote. Thus, the officials receiving the payments can be held accountable to the membership. *See Toth*, 883 F.2d at 1304. Without explicit statutory direction from Congress, we cannot condemn these payments as criminal. Accordingly, we will reverse.

MANSMANN, *Circuit Judge*, dissenting, with whom Judge GREENBERG joins.

In suggesting that "innocuous, bargained for and fully disclosed payments" from an employer to an employee representative should be lawful, the majority has placed its own policy objectives above plain language. By its own terms, the "by reason of" exception of 29 U.S.C. § 186(c)(1) simply does not include payments made to an employee representative merely because the payment is included in a collective bargaining agreement and the representative worked for the employer at one time. The plain language of the section 186(c)(1) exception is supported by the

legislative history and purpose of the exception, and the majority's conclusion is at odds with important federal policy. Because I believe that the payments at issue in this case do not fall within the exception of section 186(c)(1), I respectfully dissent.

I.

Where statutory language is plain, we must enforce that language according to its terms. *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 108 (3d Cir. 1996); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989); *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, ___ F.3d ___, ___, 1996 WL 708610, at *5 (3d Cir. Dec. 10, 1996) (unless literal application will produce absurd result, plain meaning is conclusive). It is for Congress, not the courts, to create exceptions or qualifications at odds with the LMRA's plain terms. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490, 67 S. Ct. 789, 792, 91 L. Ed. 1040 (1947).

Section 302(a) of the LMRA, 29 U.S.C. § 186(a), on its face, makes it unlawful for any employer to pay any money or thing of value to any representative of its employees. As the majority recognizes, section 302(a), standing alone, prohibits the payments at issue in this case. Maj. Op., at 4-5.

Section 302(a) contains several exceptions. Section 302(c)(1), 29 U.S.C. § 186(c)(1), renders section 302(a) inapplicable in respect to any money or other thing of value payable by an employer "to any representative of his employees, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer."

The majority concedes that the payments at issue in this case are not payments to a current or former employee "as compensation for . . . his services." Maj. Op., at 7. The sole issue, then, is whether the payments to a former employee, who presently works as a grievance chairperson for the union, are made "by reason of . . . his services as an employee of such employer."

Contrary to the position of the majority, I must conclude that the language of section 302(c)(1) is plain and does not encompass the payments at issue here.

The "by reason of" exception of section 302(c)(1) simply recognizes that current and former employees might have a right to receive payments from their employers that arise from their services for their employers but that are not properly classified as "compensation." The "by reason of" exception includes pensions, 401(k) plans, life and health insurance, sick pay, vacation pay, jury and military leave pay, and other fringe benefits to which all employees may be entitled "by reason of" their service. *See United States v. Phillips*, 19 F.3d 1565, 1575 (11th Cir. 1994) ("by reason of" exception applies to fringe benefits "such as vacation pay, sick pay, and pension benefits"), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1312, 131 L. Ed. 2d 194 (1995); *BASF Wyandotte Corp. v. Local* 227, *Int'l Chem. Workers Union, AFL-CIO*, 791 F.2d 1046, 1049 (2d Cir. 1986) ("by reason of" payments include "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits, and the like"); *see also Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.) (severance pay and payments to disabled employees are "by reason of" former employment), *cert. denied*, 493 U.S. 994, 110 S. Ct. 544, 107 L. Ed. 2d 541 (1989). Although not properly called compensation, "by reason of" payments "arise from" the employee's services for the employer.

Without the section 302(c)(1) exception, these payments would be illegal if paid to any employee or former employee who also worked for the union. Thus, an employee who worked full time for the company, but who held a part-time position with the union (a practice permitted by the Supreme Court's decision in *NLRB v. Town & Country Elec., Inc.*, ____ U.S. _____, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995)), would be unable to be paid his salary and could not receive fringe benefits—despite working full time. Section 302(c)(1) plainly exists to enable company employees to obtain what is rightfully theirs. In other words, the section 302(c)(1) exception does not entitle union representatives to receive payments *because of* their service for the union; the exception allows union representatives to receive payments *in spite of* their current service for the union.

The key, however, is that the employee must receive the compensation or other payment because of his or her service for the employer. *See, e.g., Phillips*, 19 F.3d at 1575 ("by reason of" payments "from an employer to a union official must relate to services actually rendered by the employee"); *id.* (under plain meaning of exception, "payment given to *former* employee must be for services he rendered *while he was an employee*"); *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1049 ("by reason of" payments are those "occasioned by the fact that the employee has performed or will perform work for the employer, but which is not payment directly for that work"); *Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981) (under "literal construction" of section 302, payment to industry steward who performs services for union, not employer, are unlawful). The payments at issue in this case are entirely unrelated to the representatives' services for the employer. I believe that the plain language of the section 302(c)(1) exception does not encompass the payments at issue here and that we must affirm the judgment of the district court.[1]

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1 The majority overstates the effect of our decision in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), cert. denied, 479 U.S. 932, 107 S. Ct. 403, 93 L. Ed. 2d 356 (1986).

Section 302(c)(1) states that all payments made to union representatives—whether they are in direct compensation for services (wages) or merely by reason of those services (vacation pay, jury pay, et cetera)—must somehow relate to those individuals' services for the employer. The *Trailways* opinion did not merge "compensation for" and "by reason of" as the majority suggests; it does not dispute the fact that "compensation for" and "by reason of" complement each other and that the "by reason of" exception covers certain payments that are not truly compensation. Instead, in *Trailways* we recognized that certain payments to former employees may no longer be justified once the individual stops performing services for the employer.

II.

Because the plain language of the "by reason of" exception of section 302(c)(1) does not contemplate the payments at issue here, I would affirm the judgment of the district court without further discussion. Nonetheless, as I now digress briefly to relate, the legislative history and the purpose of section 302 support my conclusion that the payments at issue are unlawful.

As the majority recognizes, section 302 is a conflict-of-interest statute that is designed to eliminate practices that have the potential for corrupting the labor movement. Maj. Op., at 11; *see Phillips*, 19 F.3d at 1574. As the majority also recognizes, Congress was concerned about, *inter alia*, bribery and other secret, back-room agreements between employers and employee representatives. *See Toth*, 883 F.2d at 1300.

The majority does not go far enough, however. Recognizing that "any person in a position of trust" must not "enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve," Congress stated that "no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2330-31 (quoting ethical practices code of American Federation of Labor and Congress of Industrial Organizations).[2] Congress desired to close

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This makes sense. For example, it is apparent that jury-duty pay is "by reason of" an employee's services to the employer. It would be strange indeed if a former employee who retired five years ago could demand to be paid by the employer for his upcoming jury duty. As *Trailways* recognizes, payments to former employees, whether as compensation for or by reason of their former services, must be related to that former service. Just as former employees are no longer entitled to "by reason of" pay such as jury-duty pay, they should not be entitled to payments for performance of union work that is entirely unrelated to their former service. Accordingly, I see no reason to reverse our decision in *Trailways*.

2 I rely on the legislative history of the Labor-Management Reporting and Disclosure Act of 1959 (an act that strengthened section 302), instead of the official history of the Labor Management Relations Act of 1947 (the act that contained section 302), because the Congressional Comments to the Labor Management Relations Act do not include a discussion of the provisions at issue here. See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 66-67, *reprinted in* 1947 U.S.C.C.A.N. 1135, 1173. In the text, I include the comments of three senators made prior to the passage of section 302 that were not included in the official conference report.

the loopholes "which both employer representatives and union officials turned to advantage at the expense of employees." *Id.* at 2330.

When he introduced section 302 in 1947, Senator Ball expressed a concern that even negotiated payments from employers might "degenerate into bribes." 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor Management Relations Act, 1947, at 1305 (1948) (discussing welfare funds). Senator Ball stated that absent section 302, "there is a very grave danger that the funds will be used for the personal gain of union leaders." *Id.* Senator Byrd echoed the concerns of Senator Ball, noting that funds from the employer should not be "paid into the treasuries of the labor unions." *Id.* According to Senator Pepper, unless authorized in writing by each individual employee (in the form of dues check-off), "union leaders should not be permitted . . . to direct funds paid by the company . . . to the union treasury or union officers." *Id.* (quoting committee report).

Section 302 therefore exists to prohibit "all forms of extortion and bribery in labor-management relations." *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1053 (emphasis supplied) (quoting S. Rep. No. 187, 86th Cong. 1st Sess. 13, reprinted in 1959 U.S.C.C.A.N. 2318, 2329). Congress was concerned with corruption through both (1) bribery of employee representatives by employers and (2) extortion by those representatives. *Toth*, 883 F.2d at 1300 (citing legislative history and cases). Congress explained:

> The national labor policy is founded upon collective bargaining through strong and vigorous unions. Playing both sides of the street, using union office for

> personal financial advantage, undercover deals, and other conflicts of interest corrupt, and thereby undermine and weaken the labor movement . . . . The Government . . . must make sure that the power [to act as exclusive bargaining representative] is used for the benefit of workers and not for personal profit.

S. Rep. No. 187, 86th Cong. 1st Sess., *reprinted in* 1959 U.S.C.C.A.N. 2318, 2331.

Thus, Congress was not merely concerned about secret, back-room deals. Congress was concerned about *any* form of payment that could upset the balance between labor and management. The payments at issue in this case do exactly that. They create a conflict of interest for union negotiators who may agree to reduced benefits for the employees in exchange for financial support for the union.

For example, let us assume that ABC Corporation and the union are engaged in difficult negotiations over a pension plan. Also assume that the employer was stonewalling on this issue, that the union had the "correct" position, and that the company could have accepted the union's proposal without suffering noticeable financial impact. Assume ABC said to the union negotiator: "I know your local is having financial trouble. We will pay the salaries of the grievance chairmen if you stop pushing for this pension plan." The negotiator, who knows that her local can no longer pay the full salaries of all the grievance chairmen, agrees, and the pension plan is dropped in favor of the financial security of the union. The agreement is included in the bargaining agreement, and both the union and ABC effectively "sell" the agreement to the employees, who ratify it (not aware that the pension plan was sacrificed in this way). According to the majority, this scenario is perfectly lawful because it was included in the agreement. According to the language, legislative history and purpose of section 302, however, this scenario represents just what Congress sought to avoid.

III.

As the majority concedes, the grievance chairmen in this case do not perform *any* services *whatsoever* for Caterpillar. Maj. Op., at 6. Instead, the chairmen perform services exclusively for the union. The majority concludes, however, that payments to such union employees are "by reason of" the employees' services to the employer. First, the majority reasons that such payments were negotiated and appear in the collective bargaining agreement. Second, the majority states that, because each employee must "give up something" in negotiations with the employer so that these payments may be included in the agreement, such payments are somehow "by reason of" the employees' service for the employer. Finally, the majority contends that the payments at issue in this case are no different than so-called "no-docking" payments made to current employees who process employee grievances during working hours. I do not believe that the majority's reasoning withstands scrutiny.

The majority first relies on the fact that the payments were negotiated and included in the collective bargaining agreement. Maj. Op., at 9-11. Simply including a payment provision in a collective bargaining agreement does not, however, make the payment "by reason of" an employee's prior service.

Section 302(a)(1) provides that it shall be unlawful for any employer to "agree to pay" any money to any representative of any of his employees. 29 U.S.C. § 186(a)(1). Thus, actual payments to union representatives are prohibited, but so are *agreements to pay* union representatives. The majority places special emphasis on the fact that the payments in this case were negotiated and were not, in effect, secret agreements. Congress, on the other hand, was not concerned about the secrecy of these agreements. If an agreement to pay is unlawful under section 302(a)(1), it is illogical to use that same agreement as a basis for finding that the resultant payment is lawful under section 302(c)(1). Congress could easily have written an exception for payments by employers to union representatives pursuant to a collective bargaining agreement. Instead, Congress limited its

section 302(c)(1) exception to payments in compensation for or by reason of a representative's services for the employer.[3]

The majority does not find support in the statute (and indeed there is none) for its conclusion that bargained-for payments should be any more legal than secret agreements. Without support, the majority asserts that an open agreement makes a payment "by reason of" services for the employer. In so doing, the majority expands the exception such that the rule is rendered a nullity.[4]

The majority next reasons that since current employees must surely "give up something" during negotiations in exchange for an agreement by the employer to pay former employees to perform union work, then those payments must be "by reason of" their services. Maj. Op., at 9. The majority contends that "the employees had to give up something in the bargaining process that they otherwise could have received . . . in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." *Id.*

Under the majority's reasoning, the union and the company could also agree to have the employer pay the salary of the international union's president and subsidize the pension fund of the union's permanent staff—all because the company's employees might "give up something" during negotiations in the hopes that they too might someday receive those payments if elected to serve the union in the proper capacity. In deciding that "giv[ing] up something" is sufficient to bring the payments at issue in this case within the "by reason of" exception contained in section 302(c)(1), the majority has embarked on a slippery slope that will legitimize virtually any type of payment from the employer to the union so long as the payment is negotiated and included in the collective bargaining agreement.

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3 Senator Ball stated that the section 302(c)(1) exception allows payment of "money due a representative who is an employee or a former employee of the employer, *on account of wages actually earned by him*." 93 Cong. Rec. 4805 (1947), *reprinted in* II NLRB Legislative History of the Labor Management Relations Act, 1947, at 1304 (1948) (emphasis supplied). It is apparent that Senator Ball did not contemplate that the narrow exception of section 302(c)(1) would someday encompass payments to a former employee that are entirely unrelated to the employee's services.

4 I am also concerned that by placing so much emphasis on the fact that the payments were negotiated and included in the collective bargaining agreement, the majority effectively permits employers and unions to negotiate over otherwise unlawful subjects of bargaining. It is beyond dispute that employers and unions cannot bargain over illegal subjects of bargaining. Nonetheless, the majority uses the bargaining process to legitimize a payment that is otherwise prohibited by statute.

The majority's reasoning violates the plain language of section 302(c)(1) in yet another way. This section allows an employer to make payments to *a* current or former employee by reason of "*his*" services as an employee. 29 U.S.C. § 186(c)(1). The majority reasons that the payments at issue in this case are lawful by reason of all of the employees' *collective* service. This is contrary to the plain meaning of the statute. If a union official is to be paid by the employer, it must be by reason of *that official's* service to the employer—not because of the service of others who might aspire to his position. Indeed, if the collective bargaining agreement allowed, but did not require, that the grievance chairperson be a former employee of the company, then the company might find itself paying an individual who was never an employee of the company by reason of *other employees'* services for the company—a result clearly not permitted by section 302(c)(1). By relying on the collective service of the employees, the majority ignores the plain language of the statute.

I also fear that the majority's reasoning could be construed to apply to several situations which would defy logic. For example, let us assume that an individual applies for (and obtains) a job with the employer. One day after beginning work, the individual is elected grievance chairperson. For the next thirty years,[5]

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5 While the agreement in this case may contain a time restriction, that restriction did not play any part in the majority's reasoning. Therefore, I presume that an agreement that does not contain a time restriction will not be unlawful under the majority's decision.

the individual serves as grievance chairperson and performs no services for the employer. Thus, the individual performed eight hours' worth of services for the employer, but was paid by the employer for thirty years. The majority's claim that this individual is being paid for thirty years "by reason of" his one-day service for the employer is illogical.

In another example, let us assume that two grievance chairpersons are elected on the same day. One ("Michael") worked for the employer for twenty years. The other ("Mary") was active in the union but never worked for the employer. Under the collective bargaining agreement in this case, the employer is required to pay Michael, but is prohibited from paying Mary. At present, both Michael and Mary perform exactly the same services, but Michael's prior employment (for which he was already fully compensated) entitles him to continued payment from the employer.[6]

The majority's reasoning also fails as a matter of logic in "open shops." In an open shop, not all employees governed by the collective bargaining agreement will necessarily be members of the union. An employee who is not a member of the union (and who therefore cannot aspire to become a grievance chairperson) will nonetheless be forced to endure a lower salary or reduced benefits due to his co-workers' decision to "give up something." In addition, unions will be able to circumvent the problems that arise when some employees elect not to join the union or pay union dues—they will seek agreements from the employer to subsidize representatives' salaries in exchange for reductions in pay or benefits. These agreements will be negotiated

6 Altering this example somewhat, let us assume that Michael worked for twenty years before being elected grievance chairperson, but that Mary worked one day. In this situation, the employer would be required to pay both Michael and Mary. Michael, however, "gave up" significantly more than Mary, as Michael worked for twenty years at reduced wages, while Mary only worked one day. The employer does not take into account what each individual gave up—the employer considers what the collective group gave up. I contend that the employer may not do that under the plain terms of section 302(c)(1).

and ratified without the input of the non-union employees. Thus, an employee who elects not to pay union dues may nonetheless face reductions in salary or benefits so that the union (which he or she does not support) may prosper. The payments at issue here are surely not "by reason of" the nonunion employees' services—yet those same payments are made possible by the non-union employees' reduced salary and benefits.

IV.

Finally, the majority contends that since no-docking provisions are lawful under section 302, the payments at issue here should also be lawful. The majority writes that "it would be strange indeed if Congress intended that granting four employees two hours per day of paid union leave is permissible, while granting a single employee eight hours per day of that same leave is a federal crime." Maj. Op., at 9.

In reasoning that the payments at issue here are analogous to no-docking payments, the majority assumes (without deciding) that no-docking provisions are lawful. While some courts have so held, we have not yet addressed the lawfulness of no-docking payments. Until we do so (and until we explain our reasons for finding such payments lawful), the majority should not analogize such payments to those at issue here.

Assuming that no-docking provisions are lawful, however, we are still not required to reach the conclusion that the payments at issue in this case must also be lawful. Indeed, there are substantial differences between no-docking payments and the payments at issue here. The primary difference is that no-docking payments are made to individuals who are current employees of the company currently performing services for the company. In contrast, the payments at issue here are made to *former* employees of the company not performing any services for the company.

In *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046, the Second Circuit observed that payments made to current employees for short absences (such as vacation pay, sick pay, or military leave pay) are all made to current employees "by reason

of" their current, ongoing services for their employer. The court then reasoned that payment to current employees for short absences to perform union work is no different from vacation pay, sick pay, and military leave pay. *Id.* at 1049. Thus, no-docking payments made to current employees who occasionally performed union work during working hours should be treated the same as other payments for short term absences.

Importantly, the court recognized that each of these payments were made to persons whose entitlement to the payments was "by reason of" *current service*. As the court noted, "no-docking provisions have relevance only to persons who are currently serving as employees." *Id.* at 1049 n.1. The common element linking sick pay and no-docking pay "is simply that the person to whom the employer makes payment is one who performs services as an employee." *Id.* at 1049 (footnote omitted). If we assume that no-docking payments are analogous to sick pay, we must conclude that they can only be made to current employees who perform services to their employers. This makes sense—former employees do not accrue sick pay or vacation pay. Likewise, they should not accrue "union-work-time pay." *See also Phillips*, 19 F.3d at 1575 n. 18 (recognizing difference between no-docking provision and payments to non-employees who perform no work for company).

The majority cites several cases from our sister courts of appeals where courts concluded that no-docking provisions are lawful. In several of those cases, however, the courts carefully distinguished no-docking payments from payments made to union officials who did not perform work for the company. In *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union, AFL-CIO*, 791 F.2d 1046 (2d Cir. 1986), for example, the court stated:

> [W]e do not suggest that section [302(c)(1)] would allow an employer simply to put a union official on its payroll while assigning him no work. . . . [A] union official who, though on an employer's payroll, performed no service as an employee, would not be within § 302(c)(1)'s exception.

Id. at 1050. In another case cited by the majority, the court agreed that payments to a union official put on an employee payroll but not assigned any meaningful work would violate section 302. *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 n.4 (5th Cir. 1986).

The majority also cites *Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir.), *cert. denied*, 493 U.S. 994, 110 S. Ct. 544, 107 L. Ed. 2d 541 (1989). There the court of appeals stated:

> At some point, it is conceivable that a bargain struck by the union and the employer might yet violate section 302—if, for example, the terms of compensation for former employment were clearly so incommensurate with that former employment as not to qualify as payments "in compensation for or by reason of" that employment . . . .

Id. at 1305. As an example of a case that would violate section 302, the court stated that "fulltime pay for no service cannot reasonably be said to be compensation 'by reason of' service as an employee." *Id.* (citing *BASF Wyandotte Corp. v. Local 227*, 791 F.2d at 1050).

Indeed, the distinction between no-docking payments and the payments at issue here is reinforced elsewhere in the labor laws. For example, 29 U.S.C. § 158(a)(2) provides that it shall be an unfair labor practice for an employer to contribute financial support to any labor organization. This rule contains one exception: "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." *Id.* Thus, while employers may allow employees to confer with their employer during working hours without loss of pay, the employer may not contribute financial support to the labor organization. The rule bans the payments at issue here; the exception allows no-docking provisions.

Other realities dictate that no-docking payments are simply not analogous to the payments at issue here. For example, employees subject to no-docking payments are more likely to do union work on an "as needed" basis. They are also more likely to be able to schedule grievance meetings and other union work

at the mutual convenience of the employees and the employer. In contrast, the grievance chairmen in this case are paid full time regardless of whether there is any union work to be done. They are never available to perform services for the employer. Thus, the four individuals who spend two hours per day performing union work (from the majority's hypothetical) are less of a burden for the employer than one employee's absence all day every day.

V.

While the majority emphasizes its policy determination that bargained-for payments should not be unlawful, it does not discuss several compelling policy reasons why we should affirm the judgment of the district court. These policy considerations go far beyond the need to avoid conflict of interest among union negotiators, a policy that is clear on the face of the statute and in the legislative history.

Initially, as the majority recognizes, the grievance chairperson will often take a position at odds with the position of management. Maj. Op., at 6-7. Indeed, the grievance chairperson is most needed when the employee's position is adverse to the employer's. In order to be effective, the grievance chairperson often will fight zealously for the aggrieved employee and against the employer. Meanwhile, the employer must pay the chairperson's salary. It seems illogical to me to force the employer to pay the salary of an individual whose sole function is to oppose the employer.[7]

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7 I recognize that the word "force" may be strong since the employer need not agree to pay the grievance chairperson during negotiations. Assuming that this pay practice is not unlawful, however, the practice undoubtedly constitutes a mandatory subject of bargaining. *NLRB v BASF Wyandotte Corp.*, 798 F.2d 849, 852-54 (5th Cir. 1986) Thus, if the employer refused to accede to such a pay provision, the employees could strike over this issue.

Indeed, those employees who may have the most influence in swaying other employees' opinions regarding strike decisions are probably the same individuals who are most likely to be elected to the position of grievance chairmen. I envision the situation where an employee who seeks the position of grievance chairperson may seek to insure that his or her desired position is fully funded by the employer before he or she accepts the position—even if that means encouraging a strike. Even the possibility that this might occur demonstrates the conflict of interest that will surely arise among those individuals who may seek the funded positions.

Next, by sanctioning an agreement whereby the company pays grievance chairmen to perform services for the union, the majority unnecessarily creates uncertainty over whether the chairmen are employees of the union or employees of the company. In *NLRB v. Town & Country Elec., Inc.*, ___ U.S. ___, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995), the Supreme Court addressed the question of who is an employee under the NLRA. The Court favorably cited several common definitions of "employee"—including "person in the service of another . . . . where the employer has the power or right to control and direct the employee . . . ." *Id.* at ___, 116 S. Ct. at 454 (citation omitted). Under this definition, a grievance chairperson appears to be an employee of the union. Citing an excerpt from the NLRA's legislative history, however, the Court noted that "employee" includes "every man on a payroll." *Id.* at ___, 116 S. Ct. at 454 (citation omitted). Since grievance chairmen remain on the company's payroll, perhaps they remain employees of the company. The majority does not decide whether the company or the union is the chairmen's employer.[8]

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8 This uncertainty will extend beyond cases arising under the NLRA. The Supreme Court recently held that, under Title VII of the Civil Rights Act of 1964, the test for deciding whether an employer "has" a particular employee is whether the employer has "an employment relationship" with the individual. *Walters v. Metropolitan Educ. Enters., Inc.*, ____ U.S. ____, 117 S. Ct. 660, ____ (1997). The Court noted, however, that "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." *Id.* at ____, 117 S. Ct. at ___; *see also* Equal Employment Opportunity Commission Notice No. N-915-052, Policy Guidance: Whether Part-Time Employees Are Employees (Apr. 1990), at 24, *reprinted in* 3 EEOC Compl. Man. (BNA), at N:3311 (interpreting both Title VII and ADEA; while one's status as an employee is defined by examining the employment relationship,"[t]he payroll is a reliable indicator of those individuals who have an employment relationship with the employer and therefore are employees"). While grievance

The failure of the majority to decide whether the grievance chairmen are employees of the union or the employer may lead to numerous problems: Is a grievance chairperson considered part of the bargaining unit while on leave? Who will be liable if a grievance chairperson injures a third party while performing union work? Who will be responsible for providing a reasonable accommodation to a grievance chairperson with a disability who needs assistance performing her union job on the employer's premises? What if a grievance chairperson decides to take FMLA leave—will his eligibility depend on whether the union is an FMLA employer or whether the company is an FMLA employer?[9] If a grievance chairperson is injured while performing union duties, will she nevertheless be entitled to disability or workers' compensation from the company? May the company terminate, suspend or discipline a grievance chairperson if he engages in activity that would qualify for termination, suspension or discipline for other employees? These questions are admittedly outside the scope of the narrow issue before us, but the majority's

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chairmen have an employment relationship with the union (indicating that the employer is the union), their relationship with the company is not completely severed, and they continue to appear on the company's payroll (indicating that the employer is the company).

I would note also that this is not a traditional dual-employer case where both the union and the company may be considered employers of the grievance chairmen. In the traditional dual-employer case, the individual performs services for both the company and the union and is paid by both the company and the union for the services performed for the respective payor. In this case, in contrast, the individuals perform services exclusively for one entity and are paid exclusively by another.

9 The Senate Report accompanying the Family and Medical Leave Act of 1993 states that the term "employ" means "maintain on the payroll." S.Rep. No. 103-3, 103d Cong. 1st Sess. 22, *reprinted in* 1993 U.S.C.C.A.N. 3, 24 (individuals on leaves of absence are considered employees "so long as they are on the employer's payroll."). It would seem, therefore, that grievance chairmen are employees of the company for purposes of the FMLA. The Report also states, however, that Congress desired that "employ" under the FMLA mean the same as "employ" under Title VII. As noted *supra* note 8, it is not clear whether the union or the company employs grievance chairmen for the purposes of Title VII.

decision will assuredly lead to innumerable disputes about the proper classification of individuals who remain on the company's payroll without performing any services for the company. If we affirm the judgment of the district court, however, it is clear that individuals who leave the company to work for the union are union employees, and the above questions resolve themselves.

The final and most important policy consideration not addressed by the majority is that federal labor policy demands that labor organizations and employers remain separate and distinct from one another. The majority would sanction a pay practice that violates this important policy.

By enacting the labor laws as written, Congress insisted that the NLRB and the courts observe a sharp line between management and labor. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 192-93, 102 S. Ct. 216, 230, 70 L. Ed. 2d 323 (1981) (Powell, J., concurring in part and dissenting in part). Indeed, the dividing line between management and labor is "fundamental to the industrial philosophy of the labor laws in this country." *Id.* at 193, 102 S. Ct. at 230; *see also NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 284-85 n.13, 94 S. Ct. 1757, 1767 n.13, 40 L. Ed. 2d 134 (1974) (recognizing "traditional distinction between labor and management"); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494-95, 67 S. Ct. 789, 794-95, 91 L. Ed. 1040 (1947) (Douglas, J., dissenting) ("industrial philosophy" recognizes that management and labor are "basic opposing forces"); *Cedars-Sinai Medical Center v. Cedars-Sinai Housestaff Assoc.*, 223 NLRB 251, 254 (1976) (Fanning, member, dissenting) ("underlying Federal labor policy . . . seeks to draw a line between labor and management"). Congress' desire to preserve the distinction between labor and management is evinced throughout the labor laws. *See, e.g.*, 29 U.S.C. § 158(a). I believe that allowing an employer to provide financial support to a union, as the majority does here, blurs the important line between labor and management and creates the potential for conflict that our labor laws do not tolerate.

VI.

I recognize that labor organizations and employers have begun to embrace a more cooperative method of negotiating and dispute resolution, and I applaud labor-management efforts to retreat from the adversarial approach that has often marred the labor landscape in this country. I believe, however, that the payments sanctioned by the majority go too far. The financial support sought by the United Auto Workers in this case contravenes the longstanding tradition of separation of labor and management. I accept and encourage arm's length cooperation between labor and management. I cannot condone payments that threaten the independence of labor, create conflicts of interest for union negotiators, and violate the plain language of our laws. It is for Congress, not the courts, to determine if and when to permit labor organizations and employers to blur the line between them.

Accordingly, I respectfully dissent.

ALITO, Circuit Judge, dissenting:

If I were a legislator, I would not vote to criminalize the payments to grievance chairmen that are at issue here. I agree with the majority that these payments differ from the corrupt practices that usually figure in prosecutions under Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186. Moreover, I am not certain that the Congress that enacted Section 302 would have chosen to outlaw such payments if it had focused specifically on that question.

Our job, however, is to interpret Section 302 as it is written. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Here, the majority has not heeded the plain meaning of Section 302 and has not shown that the literal application of the statutory language would lead to a result

that is "demonstrably at odds" with congressional intent. I therefore dissent.

As the majority acknowledges, Section 302 prohibits Caterpillar from paying the grievance chairmen unless those payments fall within one of the exceptions set out in Section 302(c), 29 U.S.C. § 186(c). *See* Maj. Op. at 4-5. The exception at issue here is that contained in subsection (c)(1), which applies to "any money or other thing of value payable by an employer . . . to any representative of his employees, . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1). The union argues that these payments fall within this exception for three separate reasons: (1) they are compensation for the grievance chairmen's current service as Caterpillar employees; (2) they are compensation for the grievance chairmen's former service as Caterpillar employees; and (3) they are made "by reason of" the grievance chairmen's former service as Caterpillar employees. I briefly discuss each of these theories below.

I.

"As Compensation For" Current Service as a Caterpillar Employee

Although the union's primary arguments appear to be that the payments are made "as compensation for" or "by reason of" the grievance chairmen's past service as regular Caterpillar employees, the union also maintains that these payments are legal because they may be viewed "as compensation for" the grievance chairmen's work as current Caterpillar employees. The union contends that the grievance chairmen, who are officially on leaves of absence from Caterpillar, are joint employees of Caterpillar and the union. Among other things, the union notes that Section 302(c)(1) seems to contemplate such joint employment, since it permits an employer, under certain circumstances, to make payments to "any representative of his employees . . . who is also an employee . . . of such employer." And the union argues that under

National Labor Relations Board decisions the grievance chairmen qualify as joint employees.

I find it unnecessary to reach the question whether the grievance chairmen may be considered joint employees. Assuming that they are, I am convinced that Caterpillar's payments to them are not made "as compensation for" their service as current Caterpillar employees. In their capacity as grievance chairmen, they owe their complete loyalty to the workers they represent. See Dist. Ct. Op. at 14-15. They plainly work for the union and not for Caterpillar, and as the majority notes, their representation of the workers "often places them in a position adverse to Caterpillar's." Maj. Op. at 6-7.[1]

It is noteworthy that the union's excellent brief, while arguing strenuously that the chairmen are joint employees, makes little effort to show that the pay and benefits they receive are compensation for services performed for Caterpillar. The union's brief merely states:

> Caterpillar . . . realizes substantial benefit from the chairman's work. As the record shows, the chairman's job . . . is "to make sure that contract works" and if he succeeds, "everyone benefits—the workers, the Company and its production needs, and the Union." App. 260.

Appellant's Br. at 48.

This argument seems to me to obliterate the distinction, which is surely significant in the real world, between services performed for an employer and services performed for a union. I do not question the proposition that "everyone benefits" if the contract works; nor do I question the proposition that the grievance chairmen can help to make the contract work; but I do not think that it follows that the work that they do should be regarded

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1 I note that the union's brief acknowledges that "the Union certainly exercises primary control over the chairman and derives the primary benefit from his work." Appellant's Br. at 45.

under Section 302(c)(1) as services performed for Caterpillar. By this reasoning, everyone who helps to make the contract work, including presumably the union officers, could be viewed as working for Caterpillar. And since the union, as well as Caterpillar, benefits when the contract works, everyone who helps to make the contract work, including Caterpillar officers and supervisors, could be viewed as working for the union. Thus, the union's logic leads to preposterous results. Therefore, regardless of whether or not the chairmen may be technically considered to be joint employees of both Caterpillar and the union, I reject the argument that the payments in question here can be permitted on the theory that they constitute payments made to the chairmen "as compensation for" current services performed by them for Caterpillar. *See* Dist Ct. Op. at 16 n.14 (because chairmen perform no functions on behalf of Caterpillar, payments are not for services rendered by chairmen to Caterpillar whether or not they can be considered current Caterpillar employees).

II.

"As Compensation For" Past Service as a Caterpillar Employee

I agree with the majority that the payments made to a grievance chairman do not constitute "compensation for . . . his service" as a company employee prior to his selection for a grievance position. This point can be demonstrated by considering the following situation. Suppose that an employee works for a number of years in a certain job category and receives during that period the same wages and other benefits as all the other employees in the same job category with the same seniority. Suppose that the employee is then selected to serve as a grievance chairman, and that he then entirely ceases his prior work and devotes his full time to grievance work, but continues to receive wages and benefits from the employer. It is plain that the wages and benefits that this employee receives after becoming a grievance chairman are compensation for his grievance work, not for the work that he did prior to his selection as a grievance chairman. If these payments were compensation for his prior work, then his com-

pensation for that work would exceed that of the other employees with equal seniority who had labored in the same job category. Moreover, if the payments were compensation for previously completed work (in other words, if the payments had been fully earned before the employee's selection as a grievance chairman), the employee would presumably be entitled to receive those payments if, instead of serving as a grievance chairman, he went fishing. But of course that is not the case.

Accordingly, I agree with the majority that the payments at issue here are not compensation for a grievance chairman's work prior to his selection for that position. As the majority states: "[t]he chairmen were already compensated for their production line work long ago in the form of wages and vested benefits." Maj. Op. at 7. "It is difficult indeed to comprehend how years, even decades, of paid union leave can realistically be thought of as compensation for time spent on the factory floor." Maj. Op. at 8.

III.

"By Reason Of" Past Service as a Caterpillar Employee

While the majority holds that the payments to the grievance chairmen are not "compensation" for their past service, the majority concludes that the payments are "payable . . . by reason of" the grievance chairmen's former service as Caterpillar employees. In reaching this conclusion, however, the majority does not explain with any specificity what it understands the phrase "by reason of" to mean. Nor does the majority take note of the clear meaning of that phrase in common parlance. If the majority paid more attention to the meaning of this language, it would be forced to recognize that the payments in dispute here are not made "by reason of" the grievance chairmen's past service as Caterpillar employees.

A. Dictionaries define the phrase "by reason of" to mean "because of" or "on account of." *See The Random House Dictionary of the English Language* 1197 (1967); 2 *The Compact Edition of the Oxford English Dictionary* 2431 (1971). When x

is said to have occurred "by reason of" y, what is usually meant is that y was, if not the sole cause of x, at least the or a major cause. If y was simply a "but-for" cause but not a major cause of y, x is not said to have occurred "by reason of" y.

This pattern of usage can be demonstrated by constructing sentences that use the phrase "by reason of" to refer to weak "but-for" causes. Such sentences invariably seem inapt and make it apparent that this use of the phrase "by reason of" is inappropriate. Here are some examples.

President Clinton could not have become President had he not reached the age of 35, but it would be ridiculous to say that he became President "by reason of" having attained his thirty-fifth birthday.

The Green Bay Packers could not have won Super Bowl XXXI without defeating the San Francisco Forty-Niners in the first round of the playoffs. However, it would seem quite odd to say that the Packers won the Super Bowl "by reason of" defeating the Forty-Niners.

The judges of this court almost certainly would not have been appointed if they had not graduated from law school. Yet it would seem very strange to say that the judges of this court were appointed "by reason of" having obtained law degrees.

I believe that these examples show that the phrase "by reason of x" refers at a minimum to a major reason for x, not simply a relatively minor "but-for" cause, and it therefore seems clear that Caterpillar's payments to the grievance chairmen are not made "by reason of" their prior service as Caterpillar employees. Such past service may be necessary for election as a grievance chairman (perhaps because Section 302 is thought to require this) and thus to the receipt of the payments at issue, but past service as a regular Caterpillar employee is certainly not the or a major cause for the payments.[2] One way to see this is to consider the

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2 In *Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union*, 785 F.2d 101, 106 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986), we noted that "[w]hile the Union is correct in asserting that had these

fact that Caterpillar has thousands of former employees, but only a very few of them are ever selected as grievance chairmen. Since all have prior service for the company in common, yet only a handful become chairmen, factors other than prior service for the company must be much more important in influencing their selection.

B. It should be noted that nowhere in its briefs does the union urge that the phrase "by reason of" should be interpreted as requiring merely "but-for" causation. In fact, the government's brief supporting the union agrees with my interpretation of "by reason of". Gov't Br. at 12 (discussing "common understanding of 'by reason of,' as synonymous with 'because,' 'on account of,' 'owing to,' 'due to' etc."). *See also* Appellant's Reply to Suppl. Br. at 3 ("there is no question" that "an employer may pay a former employee who is also a union official what he is owed *because of his service as an employee* and not one cent more") (emphasis in original) (quotation omitted).

Rather, the union's argument is that "the most natural reading [of 'by reason of'] is that this phrase refers to payments which an individual *earns the right to receive by serving as an employee* but which are not, strictly speaking, remuneration for particular hours of work." Appellant's Br. at 21 (emphasis added). *Accord id.* at 34 ("so long as the right to such payments is earned by previously having performed 'service to the employer'"); Appellant's Reply Br. at 18-19 ("'preexisting wage and benefit payments' for an employee elected to a full-time union position qualify as 'payments by reason of' service as an employee, at least where *the right to such payments has* been collectively bargained and *accrued as a result of the employee's work for the employer*.") (emphasis added) (other emphasis omitted); *id.* at 21 (the "by reason of" exception "leaves no room for payments which were not earned by prior service"). The union

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individuals never been Trailways' employees they would not be eligible for pension contributions made on their behalf, it does not therefore follow that the pension fund contributions made by Trailways . . . were made 'in compensation for, or by reason of,' their former service to Trailways . . . ."

contends that the Eleventh Circuit's opinion in *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), supports its position that Caterpillar's payments to the chairmen were "by reason of" their service as Caterpillar employees. *Phillips* held that payments by a company to a union official were illegal if the union official "did not have a right to such payment before he severed his employment relationship with the company." *Id.* at 1575. The union relies (Br. at 37) on the court's explanation that "[w]hen an employee's right to a benefit has fully vested before the leave of absence begins, there is no danger of corruption when the employer delivers the benefit after that employee leaves the company to work for the union . . . ." *Id.* at 1576.

I agree that a payment from Caterpillar to a former employee now working as a grievance chairman would be legal under Section 302 if the chairman's right to that payment vested before he became a former employee. This interpretation of the "by reason of" exception has been adopted by several other courts of appeals. *See Phillips*, 19 F.3d at 1575; *Toth v. USX Corp.*, 883 F.2d 1297, 1303 n.8 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989). *Cf. BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1049 (2d Cir. 1986).

But the union's argument fails on its own terms here, because it is simply not true that the chairmen's rights to receive the payments at issue vested before they left Caterpillar's employ. On the contrary, their rights to receive these payments are conditioned upon their performance of certain duties in their current positions as grievance chairmen. If, as the union argues, the chairmen's rights to these payments were earned before their employment with Caterpillar terminated, then the chairmen could go fishing all day, every day, instead of processing grievances. Here, contrary to the government's argument, see Gov't Br. at 16, the payments made by Caterpillar *are* measured by the chairmen's current services for another employer, i.e., the union; they can earn as much as 46 hours' pay if they perform sufficient work, but if they perform less work they receive less and if they perform no work—if they just go fishing—they get nothing at all. In this

respect, then, this case is identical to *Trailways*, and the union fails completely in its attempt to distinguish it on the ground that the chairmen are paid at a rate set by Caterpillar rather than by the union.

The basic problem with the union's argument is that it confuses an employee's *eligibility* for a payment with his *right* to it. The chairmen's prior service as employees of Caterpillar rendered them eligible to receive their Caterpillar salaries if they were elected as chairmen, but their prior service in no way gave them any right to receive any amount of money. In my view, it is obvious that their prior service is not the sole or even a major reason for their receipt of the disputed payments. It thus cannot be said—absent outright linguistic torture—that the payments are made "by reason of" their prior service.

C. The majority's main argument in support of its "by reason of" holding is that under the collective bargaining agreement "every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." Maj. Op. at 9. In other words, the majority views the collective bargaining agreement as providing each employee with the contingent right to receive future payments from the company after that employee's regular service has terminated (the contingencies being the employee's selection and subsequent work as a grievance chairperson). Moreover, the majority appears to argue that a bit of each employee's work under the collective bargaining agreement goes to pay for this contingent right, and the majority therefore reasons that if an employee is later selected as a grievance chairman and receives salary and benefits from Caterpillar, those payments are received "by reason of" the bit of that employee's past service that went to pay for this contingent right.

This argument is inventive—but wrong. At the outset, it should be noted that the majority's argument logically leads to strange results that the majority does not seem to contemplate. The majority's argument is dependent on a grievance chairman's

having "paid," while working as a regular employee, for the contingent right to receive future payments from the employer. Thus, the argument cannot justify the initial negotiation of a collective bargaining agreement containing a provision such as the one in question here. Suppose that a particular company and union had never before agreed on an arrangement under which the company would pay the grievance chairmen but that the company and the union then enter into such an arrangement. The first group of employees chosen as grievance chairmen would not have previously made any "payments" to the employer in exchange for the contingent right to receive future wages and benefits from the employer. Therefore, even under the majority's theory, the company's payments to the initial group of grievance chairmen would be illegal. In other words, the majority's theory leads logically to the weird result that the company and the initial group of grievance chairmen would have to commit federal felonies in order to set in motion the type of arrangement that the majority sanctions.[3]

Moreover, although the majority postulates that regular employees "pay" for the contingent right to receive future compensation from the employer, it is by no means clear that this is true in most cases. Obviously, each regular employee gives up wages and/or other benefits in exchange for the employer's payments to the grievance chairmen, but what each regular employee is chiefly "paying" for is not the contingent right to receive future payments from the employer but rather the current improvement in the handling of grievances that presumably results from the work of the grievance chairmen. Indeed, under most circumstances, I suspect that virtually all, if not all, of the "payments" made by a regular employee in any particular year go to fund the employer's payments to the grievance chairmen in that year and not in future years when that employee might himself be a grievance chairman.[4]

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3 I would assume that the same would be true every time a new collective bargaining agreement took effect.

4 It makes sense that a regular employee should pay little if anything for the contingent right discussed in the text (as distinct from a current improvement

Finally and most importantly, postulating that each regular employee "pays" something for the contingent right to future compensation by the employer does not obviate the problem that past service as a regular employee is not the sole or even a major cause of this future compensation. Assuming that each regular employee makes such "payments" and that the payments are a but-for cause of any compensation that this employee may receive in the future as a grievance chairman, there are two other, more important causes of that compensation: selection as a grievance chairman and the satisfactory performance of the work of a grievance chairman on a daily basis. Thus, to say that a grievance chairman is paid year after year after year "by reason of" his past service as a regular employee makes no more sense than to say that a regular employee is paid year after year after year "by reason of" his having acquired the qualifications that were necessary for his original hiring.

For these reasons, it seems clear to me that the payments at issue in this case are made "by reason of" the chairmen's grievance work and not "by reason of" their prior service as regular employees. Consequently, these payments cannot be squeezed

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in grievance handling) because, from the standpoint of a wealth-maximizing regular employee, this contingent right has little if any value. This is so for two reasons. First, this contingent right carries little prospect of financial gain. A regular employee, if selected as a grievance chairman, will have to make future contributions of labor (performing the work of a grievance chairman) that are fully worth the wages and benefits that the employer will provide. (Indeed, under the collective bargaining agreement before us here, a regular employee selected as a grievance chairman does not realize any gain in wages or benefits; he continues to receive the same wages and benefits as he did before.) Second, this contingent right probably does little to increase an employee's chances of obtaining whatever non-monetary gratification may flow from doing the work of a grievance chairman as opposed to the work of a regular employee. Assuming that employees in a particular bargaining unit who are willing to forgo $x per year in exchange for their employer's payments to the grievance chairmen would be willing to pay the same amount per year in increased union dues so that the union could make these payments, there will be approximately the same number of grievance chairman positions (and therefore approximately an equal chance of performing the work of a grievance chairman) whether or not the grievance chairmen are paid by the employer.

into the "by reason of" exception in Section 302(c)(1), 29 U.S.C. § 186(c)(1), and I am therefore constrained to conclude that these payments are prohibited by the plain language of Section 302.

D. The majority also argues that by exempting payments made "by reason of" a former employee's past service in addition to payments made "as compensation for" that service, Congress must have intended that the two phrases refer to different things. I have no quarrel with this elementary principle of statutory interpretation, but I do not agree with the majority's application of it. The majority fails to acknowledge that three courts of appeals have construed "by reason of" to refer to a class of payments distinct from those covered by the "as compensation for" exemption, and that those courts have not adopted anything like the interpretation espoused by the majority. Because the Eleventh Circuit's discussion in *Phillips* precisely answers the majority's contention, I quote it at length:

> Congress, in using the alternative formulations of "as compensation for" and "by reason of" in that provision, intended to remove from the statute's prohibitions two general categories of payments to employees: (1) wages, i.e., sums paid to an employee specifically "as compensation for" work performed; and (2) payments not made specifically for work performed that are occasioned "by reason of" the fact that the employee has performed (or will perform, in the case of a current employee) work for the employer. *The latter category includes employee "fringe" benefits, such as vacation pay, sick pay, and pension benefits.* Whether "as compensation for" or "by reason of" service to an employer, all payments from an employer to a union official must relate to services actually rendered by the employee for the section 186(c)(1) exception to apply. * * *
>
> An employee's "right" to receive a "benefit" while on leave with the union has been upheld when it vested *before* the employee began the leave of absence . . . . *In contrast, the section 186(c)(1) exception does not apply*

> *when a company pays a union official who was a former employee, but who did not have a right to such payment before he severed his employment relationship with the company.*

19 F.3d at 1575 (first and third emphases added) (citations omitted). *BASF Wyandotte Corp.*, on which *Phillips* principally relied, deemed "fring[e] benefits" such as "vacation pay, sick pay, paid leave for jury duty or military service, pension benefits, and the like" to be within the "by reason of" exception. 791 F.2d at 1049. *Accord Toth*, 883 F.2d at 1303 n.8 (severance payments are "by reason of" former employee's past service). These decisions are consistent with *Trailways'* holding that the payments to former employees contemplated by section 302(c)(1) are those that relate to "*past* services actually rendered by those former employees *while they were employees of the company.*" *Trailways*, 785 F.2d at 106 (emphases in original).

Thus, the distinction between the "alternative formulations" is that "compensation" refers to *wages* paid for specific work performed, while "by reason of" refers to *non-wage payments* made after an employee becomes a former employee but earned while he or she was still an employee.[5] In contrast to the Second, Seventh, and Eleventh Circuits, the majority here holds that the "by reason of" exception refers to *wage payments* that would not be made *but for* the recipient's prior service as an employee.

E. The only justification for disregarding the plain meaning of the "by reason of" exception would be that it would produce "a result demonstrably at odds" with congressional intent or "would thwart the obvious purpose of the statute." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (quotation omitted), but the majority does not even attempt to make such a showing. I see nothing that demonstrates that following the plain meaning of the statutory language would produce a result that is demonstrably at odds with Congress' intent. I find nothing conclusive in the legislative history, and while I agree with the majority that the payments in question here are quite different from "bribery and extortion," Maj. Op. at 11, there are reasons, many of which are set out in Judge Mansmann's opinion, why Congress might have wished to preclude such employer payments. I will simply note that this very case serves as an example of why Congress might have wanted to prohibit the payments at issue. The majority's description of these payments as "innocuous" (Maj. Op. at 7) ignores the fact that Caterpillar's decision to stop paying the chairmen's salaries was designed to "put economic pressure on the Union" during the strike. (App. 144) Prohibiting company control over such payments furthers the goal of union independence by removing this weapon from the company's arsenal. In short, while I am unsure whether this prohibition is on balance desirable or undesirable, I am certain that it is far from absurd. The "explicit statutory direction" that the majority purports to find wanting (Maj. op. at 11) is plainly contained in the text of Section 302.

The history of "no docking" provisions, which seems to form the centerpiece of the union's submission, also does not persuade me to disregard the plain statutory language. "No docking" provisions differ, at least in degree, from the type of arrangement that is before us, and there are times in the law when differences in degree are dispositive. In any event, the legality of "no docking" provisions is unsettled; that question is not before us; and, like Judge Mansmann, I would not reach it here.

Since Section 302 is a criminal statute, I would apply the rule of lenity if I thought that the statutory language was ambiguous, *see, e.g., Crandon v. United States*, 494 U.S. 152, 158 (1990), but since I see no ambiguity, I find that rule inapplicable.

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5 In *Toth*, the Seventh Circuit interpreted our decision in *Trailways* as resting on the proposition that "any compensation continuing beyond the time of an employee's 'past' employment could not be 'by reason of' [that] employment." 883 F.2d at 1302. While I am less confident than the *Toth* court that *Trailways* should be read so to hold, I agree with the *Toth* court that some payments made after the termination of the recipient's employment with the company can be made "by reason of" his or her prior employment. What is important is whether the recipient has a right to the payment before he or she leaves the company, not the date on which the payment is actually made or received. *See Toth*, 883 F.2d at 1302 (criticizing *Trailways* for this reason).

See Reno v. Koray, 115 S. Ct. 2021, 2029 (1995), (rule of lenity applies only "if, 'after seizing everything from which aid can be derived,' we can make 'no more than a guess as to what Congress intended'") (citations omitted). I would therefore affirm the decision of the district court. If this result is not desirable as a matter of public policy, the union and its amicus, the United States, surely understand how to seek correction in Congress.[6]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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6 Indeed, the government's amicus brief seems at places to amount to a request that we craft a legislative solution to the problem of collective bargaining agreements that call for employers to make payments to former employees who become union officials. According to the government's brief, such payments may violate Section 302 if they are "incommensurate" with the recipient's former compensation as a regular employee, if the recipient negotiated the right to receive those payments, or if the recipient has not worked for the employer in his or her regular job for an extended period and is unlikely ever to return to such work. U.S. Amicus Br. at 26-28. These may be sensible rules, but I am unable to tease them out of the current language of Section 302. They provide material for legislative, not judicial, consideration.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation
doing business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA; and its affiliated
LOCAL UNION 786,

Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 92-01854)

Present: Sloviter, *Chief Judge*, and Becker, Stapleton, Mansmann, Greenberg, Scirica, Cowen, Nygaard, Alito, Roth, Lewis and McKee, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on August 8, 1996 and reargued in banc on December 2, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 12, 1995, be, and the same is hereby reversed. Costs taxed against appellee. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Douglas P. Sisk
Clerk

Dated: March 4, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-7012

CATERPILLAR INC., a Delaware Corporation
doing business in Pennsylvania

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and its affiliated LOCAL UNION 786,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 92-01854)

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and McKEE, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing en banc in the above appeal, it is

O R D E R E D that the Clerk of this Court list the above case for rehearing en banc at the convenience of the court.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: October 11, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854

CATERPILLAR, INC.,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated Local Union 786,
Defendants

MEMORANDUM

We are considering the parties' cross motions for summary judgment.

I. BACKGROUND

Plaintiff, Caterpillar Inc. ("Caterpillar"), is engaged in the manufacture, sale, and distribution of heavy equipment at plants throughout the United States, including a facility in York, Pennsylvania. Defendants are the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") and its Local Union 786 ("Local 786").[1] Since 1954, Caterpillar has recognized the UAW and Local 786 as the exclusive collective bargaining representative for certain of its employees at its York plant.[2]

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1 We will, at times, refer to the Defendants jointly as "the Union."

2 Caterpillar also recognizes the UAW and its respective affiliated Local Unions as the exclusive collective bargaining representative at many of its other plants.

Prior to 1973, the parties' collective bargaining agreements contained provisions specifically authorizing union representatives such as stewards, chief stewards, and committeemen to leave their jobs to handle grievance related matters, without loss of pay and while maintaining their status as full-time Caterpillar employees. In 1973, Caterpillar agreed to allow union committeemen and grievance committee chairmen to work full-time in their union capacities while still receiving wages and benefits from the company. These individuals are paid the wages and benefits earned on their last job with the company, but are considered to be on leave of absence. At Caterpillar's York facility, these individuals are Local 786's Grievance Committee Chairman and its Alternate Chairman (collectively "the Chairman").

The parties' most recent collective bargaining agreement expired on November 30, 1991. The UAW and many of its locals subsequently began a strike against Caterpillar, although members of Local 786 did not participate. The striking employees eventually returned to work without a contract. On October 30, 1992, Caterpillar notified the UAW that it would stop paying the Chairman, and the other grievance committee chairs at other plants, as of November 16, 1992. In the letter informing the UAW of its decision, Caterpillar stated that

> Indeed, one may even question the legality of such payments. Therefore, effective November 16, 1992, and continuing until a new agreement is reached, Caterpillar no longer intends to subsidize the UAW by paying wages to or by providing coverage at no cost under the Group Insurance Plan for the Union's various chairmen of grievance committees . . .

[Letter from J.L. Brust to Elliott Anderson of 10/30/92]. On November 17, 1992, the UAW responded by filing an unfair labor practice charge with NLRB offices in Baltimore, Maryland, and

Peoria, Illinois, alleging a violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158.[3]

On December 21, 1992, the NLRB notified the parties that, if no settlement was imminent, the NLRB would file a similar complaint against Caterpillar. The next day, Caterpillar filed the instant action, seeking a declaration that the payments to the Chairman are illegal under § 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186.

Because of the pending NLRB proceedings, on May 24, 1993, this action was stayed. Thereafter, the UAW and its locals, including Local 786, began another strike against Caterpillar.[4] On January 31, 1995, NLRB Administrative Judge James L. Rose issued a Decision and Recommended Order dismissing the Union's unfair labor practice charges. He concluded that the Union is responsible for the duties performed by the Chairman and decides the manner in which they are performed. He then determined that Caterpillar's payment of wages and benefits to the Chairman violated sections 8(a)(3) and 8(b)(2) of the NLRA.[5] Although the Administrative Judge's recommendation is not a final decision of the NLRB, because of the pendency of this case since 1992, we lifted the stay and both parties filed motions for summary judgment.

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3 These provisions require an employer to bargain in good faith with his employees' representative before unilater### ally changing a term or condition of employment. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 542-43, 108 S. Ct. 830, 832, 98 L. Ed. 2d 936, 943 (1988).

4 Recently, the UAW ordered the striking workers back to work, notwithstanding the fact that no new agreement has been reached.

5 He also noted that "I believe that payments to the chairman and full-time committeemen raise a serious issue under Section 302. Even if benign, Articles 4.6 and 4.7 shift the financial responsibility for certain full-time union officials from the Union to [Caterpillar]." [Decision at 7]. However, he declined to reach the issue of whether the payments violated section 302 because they were facially violative of section 8 of the NLRA.

II. LAW AND ANALYSIS

A. *Standard of Review*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986). Summary judgment must be entered in favor of the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party . . . ." *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted).

When a moving party has carried his or her burden under Rule 56, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . ." *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted). The nonmoving party "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment," and cannot "simply reassert factually unsupported allegations contained in [the] pleadings." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (emphasis in original) (citation omitted). However, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986) (internal citations omitted).

B. *Section 302*

Plaintiff seeks a declaration that payments to the Chairman are unlawful under section 302(a) of the LMRA. That section provides that

> It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other things of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce;
>
> . . .

29 U.S.C. § 186(a). It is undisputed that Caterpillar is an employer in an industry that affects commerce and that the Chairman is a representative of Caterpillar's employees. Thus, it would appear that Caterpillar's payment of his wages would be unlawful. However, section 302(c) of the LMRA provides that

> [t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, who is also an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer.

29 U.S.C. § 186(c).[6] Defendants argue that the Chairman is an employee of Caterpillar, that the payments are for his services to

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6 The parties disagree over who has the burden of proof on these issues. Plaintiff maintains that the payments are presumptively improper under section 302(a), and that the Defendants carry the burden of establishing that one of the affirmative defenses of section 302(c) is applicable. Defendants argue that Plaintiff must establish that the payments are improper, and, in doing so, show that none of the enumerated exemptions of section 302(c) apply. Although it appears that Defendants must prove that one of the exceptions of section 302(c) applies, our decision would be unaffected regardless of which party had the burden of proof. *See United States v.*

Caterpillar, and that the payments are permissible under section 302(c)(1).[7]

The Third Circuit addressed these issues in *Trailways Lines v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932, 107 S. Ct. 403, 93 L. Ed. 2d 356 (1986). In that case, the employer instituted an action against the union seeking a declaration that a section of the parties' collective bargaining agreement, which required the employer to make contributions to a joint union-management pension trust fund for employees who took leaves of absence to accept full-time positions with the union, violated section 302. *Id.* at 102. The court first noted that "[t]here is no dispute that Trailways' payments to the Pension Trust Fund would be prohibited by § 302(a) unless they fall within one of the express statutory exemptions provided by section 302(c) . . . ." *Id.* at 103-04. Similarly, there is no dispute in this case that the payments to the Chairman would violate section 302(a) unless one of the enumerated exceptions apply.

Alaimo, 191 F. Supp. 625, 626 (M.D. Pa.), *aff'd*, 297 F.2d 604 (3d Cir. 1961), *cert. denied*, 369 U.S. 817, 82 S. Ct. 829, 7 L. Ed. 2d 784 (1962) ("It is incumbent upon one who relies upon an exception [in section 302(c)] to set it up and establish it").

7 Defendants also advance three other defenses to Plaintiff's claim. However, each lacks merit. First, Defendants argue that Plaintiff's claim is moot because the collective bargaining agreement which called for the payments in question has expired. There is currently no contract between Caterpillar and the Defendants, although it appears that the striking employees have just been ordered by the Union to return to work. The parties are negotiating a new contract and this issue is, undoubtedly, part of that process and is not moot. *See, e.g., American Comm. Barge Lines Co. v. Seafarers Intern. Union*, 730 F.2d 327, 332-33 (5th Cir. 1984) (discussing mootness of proposed injunction against strike and bargaining demands).

Next, citing a similar provision of the NLRA, Defendants assert that a six-month statute of limitation is applicable to Plaintiff's claim, see 29 U.S.C. § 158(b)(6), and/or that the doctrine of laches prohibits Plaintiff's claims. However, we do not read Plaintiff's complaint to seek redress for past payments. Instead, it seeks a declaration that future payments are unlawful under section 302. Thus, the statute of limitaions and/or doctrine of laches are inapplicable.

The defendant in *Trailways* argued that two exceptions, section 302(c)(1) and section 302(c)(5), were applicable there.[8] The court held that the exception in section 302(c)(5) was inapplicable because the employees were not "current employees" of the employer, but were instead "former employees" of the employer who had become current employees of the union. *Id.* However, the court could not use the same analysis with respect to section 302(c)(1) because that exception applies to "an employee *or former employee* of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. § 186(c)(1) (emphasis added).[9] In addressing the claimed exemption of the former employees, the court found that "clearly the statute contemplates payments to former employees for *past* services actually rendered by those former employees *while they were employees of the company.*" *Id.* at 106 (emphasis in original). Because there was no evidence that the payments were for past services actually performed by the former employees for the employer, the court held that the section 302(c)(1) exception did not apply. *Id.*

Here, we must determine two related issues: (1) whether the Chairman is a current "employee" of Caterpillar; and (2) whether the payments to the Chairman are for services rendered to Caterpillar.[10]

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8 Section 302(c)(5) is not applicable in the instant case.

9 Plaintiff misrepresented the holding of *Trailways* when it asserted that the court, in construing the exemption in § 302(c)(1), "held the exemption applies only to *current* and *active* employees of the employer." [Pl.'s Mem. in Opp'n to S.J. at 7].

10 We recognize that, technically, we need not determine whether the Chairman is an "employee" of Caterpillar, since section 301(c)(1) applies to both current and former employees. However, as set forth below, resolution of this issue facilitates the determination of whether the Chairman is being paid for services rendered on behalf of Caterpillar.

1. *Is the Chairman a current and active employee of Caterpillar?*

"[T]he issue of the status of employees is not solely a question of contract. Rather, it is a question of law turning also on the degree of control exercised by the employer over the employee, and on a determination of for whose benefit the employee is performing his services." *Id.* at 106 (citation omitted)" In considering the facts presented, the court in *Trailways* held that "[u]nder either of these tests, the individuals here cannot be considered [the employers'] employees while on leave, since they are in no way controlled by [the employer], nor do they perform any services for the benefit of [the employer]." *Id.* at 107.

Plaintiff argues that the decision in *Trailways* mandates judgment in its favor because it is undisputed that the Chairman is an employee of the Union, and not an employee of Caterpillar. Defendants maintain that the Chairman is an employee of Caterpillar. Applying the tests set forth in *Trailways*, we conclude, as a matter of law, that the Chairman is not a current employee of Caterpillar.

The first test for employee status concerns the degree of control exercised by the employer over the employee.

Trailways, 785 F.2d at 106. In support of their argument that the Chairman is an employee of Caterpillar, Defendants assert that his

> duties paid by Caterpillar revolved completely around the Caterpillar workers and were closely controlled. The functions for which Caterpillar paid and did not pay, the method of selection of the positions, the place where the individuals were to work, the amount Caterpillar paid (tied to the individual's last Caterpillar

11 Defendants assert that "*Trailways'* reliance on these factors to determine 'present employee' status was rejected in *NLRB v. Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986)." [Defs.' Br. in Opp'n to S.J. at 5 n.2]. Assuming *Wyandotte* did reject *Trailways*, we are bound to follow controlling Third Circuit law.

> position prior to assuming the full-time Chairman and Alternate position) are all set forth in great detail in the CBA. In addition, the full-time Chairman and Alternates were in frequent contact in person and by phone with Caterpillar's managers and foremen, and the York Chair spent an average of one and one-half days per week at the plant. When the York Chair performed Union activities not identified by the collective bargaining agreement as resolving around grievance and related problem-solving, he was "called out" and not paid by Caterpillar. This frequently resulted in Caterpillar paying him for less than 46 hours in a week.

[Defs.' Br. in Opp'n to S.J. at 10]. Further, Defendants argue that the Chairman: was assigned to a particular shift and required to get permission from Caterpillar to change shifts; had to notify Caterpillar if he was to be late, leave early, or take sick time or vacation; received pay checks identical to other employees; was classified as an active employee for other purposes; and turned in weekly time cards.[12]

Even assuming Defendants' assertions are true, they have no impact on the issue of who controlled the Chairman's work and the manner in which that work was performed. Each of the facts set forth by Defendants is related to Caterpillar's payment of the Chairman's wages. In order to pay the Chairman, Caterpillar had to know what hours he worked, when he was on vacation, on sick leave, and when he was performing duties outside those contemplated by the collective bargaining agreement. This does not mean, however, that he was an "employee" of Caterpillar. Otherwise, any company that paid an individual's wages, and required an accounting of the hours worked, would be deemed an employer of that individual.

Caterpillar does not exercise sufficient control over the Chairman to classify him as its employee because Caterpillar did

12 Defendants do not identify the source of this "evidence" other than a reference to "Orndorff Declaration."

not control the tasks that the Chairman performed, or the manner in which they were performed. At the NLRB Hearing, Orndorff testified that during the time he was acting as Grievance Committee Chairman, he did not receive job assignments from Caterpillar. [NLRB Hearing at 4467].[13] Further, in discussing his duties as Chairman, both in his deposition and his testimony, Orndorff never indicated that he had duties other than those directly related to the Union. At the NLRB Hearing, Judge Rose questioned Orndorff as follows:

> Q: Now, how many of those hours did you actually spend at the plant:
>
> A: Probably a day a week I actually spent in the plant.
>
> Q: Eight hours?
>
> A: Yes.
>
> Q: And the rest of the time was in the Union Hall?
>
> A: Working out of the Union Hall or—yes, sir.
>
> Q: Okay. Now tell me, did the Company know what you were doing when you were at the Union Hall?
>
> A: I wouldn't see how they would know everything I did. No.
>
> Q: You didn't have a Company supervisor or anybody at the Union Hall?
>
> A: Nobody from the Company was at the Union Hall, no, sir.
>
> Q: So they would have no way of knowing what you did?
>
> A: I wouldn't have any—no, they wouldn't have any that I know of.

13 Specifically, when asked whether the company had assigned job duties, Orndorff stated that "I worked out of the Union Hall. That's—I had my privileges under 4.6." *Id.*

> Q: They wouldn't know whether you were working on grievances or working on Union business or doing crossword puzzles or what?
>
> A: Absolutely.
>
> Q: Is that correct?
>
> A: I would say, yes.

[NLRB Hearing at 4500-01]. Additionally, Orndorff testified that, to his knowledge, no one from Caterpillar ever went to the union hall to check on his work as chairman. [Orndorff Dep. at 43-44]. In response, Defendants have not identified any evidence that indicates that the Chairman's work was controlled by Caterpillar and we conclude that Caterpillar did not exercise control over the Chair man's activities.

The second test for employee status is "for whose benefit the employee is performing his services." *Trailways*, 785 F.2d at 106. Defendants suggest that Caterpillar receives the benefit of the Chairman's employment because the processing of grievances is "integral" to an employer. However, it is clear that the Chairman performs his services for the benefit of the Union. In his deposition, Orndorff testified as follows about his position:

> Q: What were your duties?
>
> A: My duty is represent the members of Local 786.
>
> Q: In what capacity?
>
> A: As their chairman.
>
> Q: As chairman of the grievance and bargaining committee; is that correct?
>
> A: Yes, sir.
>
> Q: Okay. What does then—what do you do as the chairman of the grievance and bargaining committee as of November 15, 1992?

A: Try to interpret and enforce the contract on behalf of members of Local 786.

Q: Anything else?

A: I don't understand what you mean.

Q: Did you do anything else in carrying out your duties?

A: A lot of things that were not spelled out there as far as joint things between the company and union that, again, were in the best interest of the members of Local 786.

[Orndorff Dep. at 27-28]. It is clear from the Chairman's testimony that his position is intended to, and does in fact, substantially benefit the Union. While Caterpillar may indirectly benefit in some fashion from the Chairman's activities, there can be no dispute that it is the Union and its members that receive the direct and significant benefit from his work. *See Reinforcing Iron Workers Local Union 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 862 (7th Cir), *cert. denied*, 434 U.S. 921, 98 S. Ct. 395, 54 L. Ed. 2d 277 (1977).

On this basis, we conclude that the Chairman is not a current and active employee of Caterpillar for purposes of the exemption in section 302(c)(1).

2. *Are the Chairman's wages paid as compensation for services rendered to Caterpillar?*

The paramount question is whether the Chairman's wages are paid for services rendered to Caterpillar. The fact that the Chairman is not a current employee of Caterpillar mandates that, for the payments to be legal, they must have been payment for services rendered while he was an employee of Caterpillar. *Trailways*, 785 F.2d at 107. Here, as in *Trailways*, nothing in the record could support such a conclusion.[14]

14 Even if we determined that the Chairman is a current Caterpillar employee, we would still conclude, as a matter of law, that the wages he receives are not for services rendered for Caterpillar. This is true because the evidence shows that, as in *Trailways*, the Chairman performed *no functions* on behalf of Caterpillar. Rather, his job was to act "in the best interest" of the Union. Thus, payment to the Chairman is impermissible whether or not he is classified as a current employee of Caterpillar.

Defendants argue, citing *Communications Workers of America v. Bell Atlantic Network*, 670 F. Supp. 416 (D.D.C. 1987), that because the Chairman's wages are based upon his last position with the company, those payments are for services rendered on behalf of Caterpillar. In *Communications Workers*, the court distinguished *Trailways* on this ground because the payments in *Trailways* were based on the former employee's position with the union. *Id.* at 421-22. However, we find the distinction made in *Communications Workers* unpersuasive. The fact that the Chairman's wages are calculated on the basis of his last position with the company does not, in any way, mean that those wages are for services rendered while he was an active Caterpillar employee. In *Trailways*, the court determined that the payments were improper because there was no evidence that they were in recognition of the employee's past services to the employer. The record here is devoid of evidence that the Chairman's wages are for services rendered while he was employed by Caterpillar.[15]

C. *Conclusion*

We hold, as a matter of law, that the Chairman is not a current employee of Caterpillar because Caterpillar does not exercise sufficient control over his duties and does not significantly benefit from the performance of those duties. Further, the payments to the Chairman are not for services rendered while he was an employee of Caterpillar. Accordingly, the exemption of section 302(c)(1) is inapplicable, and any payments made by Cat-

15 In their reply brief, Defendants state that "[w]hile Defendants should prevail under *Trailways*, if *Trailways* could be read to prohibit the payments in this case, *Trailways* should be overruled to that extent." [Defs.' Reply Br. at 12-13 n.16]. This statement illustrates the only argument that Defendants can and do make here: *Trailways* was wrongly decided. However, even if we were inclined to agree, which we are not, we are without power to overrule a decision of the Third Circuit.

erpillar to the Chairman are unlawful under section 302(a) of the LMRA.[16]

We will issue an appropriate Order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: December 8, 1995

16 Defendants argue that the goals of section 302 are not furthered by holding that these payments are unlawful, and that payments of this sort are commonplace today and have been so for many years. Admittedly, the purpose of section 302 was to "prevent bribery, extortion, shakedowns, and other corrupt practices." *Communications Workers*, 670 F. Supp. at 424 (citing H.R. Rep. No. 286, 91st Cong., 1st Sess. 1-2, *reported in* 1969 U.S. Code Cong. & Ad. News at 1159-60). Further, we recognize that our decision could have far reaching effects on not just these parties, but on other employer/labor union relationships. However, in applying the plain language of section 302, as defined by the Third Circuit in *Trailways*, we must conclude that the proposed payments are unlawful.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854

CATERPILLAR, INC.,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated Local Union 786,
Defendants

ORDER

AND NOW, this 8th day of December, 1995, it is ordered that:

1. Plaintiff's motion for summary judgment, filed October 19, 1995, is granted.

2. Defendants' motion for summary judgment, filed October 19, 1995, is denied.

3. Any payment of wages by Caterpillar to the Chairman or Alternate Chairman of the Grievance Committee of Local 786 in the circumstances of this case would violate section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a).

4. The Clerk of Court shall enter judgment in favor of the Plaintiff and against Defendants, and close this file.

/s/ William W. Caldwell
William W. Caldwell

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. A. No. 1:CV-92-1854
J. Caldwell

CATERPILLAR, INC.,
Plaintiff

vs.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS AFFILIATED LOCAL UNION 786,
Defendants

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the plaintiff, Caterpillar, Inc., and against the defendants, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICUL-

TURAL IMPLEMENT WORKERS OF AMERICA AND ITS AFFILIATED LOCAL UNION 786.

December 8, 1995
Date

Mary E. D'Andrea
Clerk

/s/ George T. Gardner
(By) Deputy Clerk
George T. Gardner

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186 (1994 & Supp. I 1995), provides as follows:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 13102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the

absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the dis-

trict court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to in-

itiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

(d) Penalties for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industrywide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and

be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(e) Jurisdiction of courts

The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

(f) Effective date of provisions

This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Contributions to trust funds

Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

JD-8-95
Peoria, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

33-CA-9990
33-CA-10033

CATERPILLAR, INC.

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA AND ITS LOCAL 974

Deborah A. Fisher, Debra L. Stafanik and Valerie L. Ortique, Esqs., of Peoria, Illinois, for the General Counsel.

Stanley Eisenstein and Jane Bohman, Esqs. of Chicago, Illinois, and *Nancy Schiffer, Esq.* of Detroit, Michigan, for the Charging Party.

Columbus R. Gangemi, Jr., Gerald C. Peterson and Joseph J. Torres, Esqs., of Chicago, Illinois, and *Thomas G. Harvel, Lee Smith Esqs.*, of Peoria, Illinois for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This phase of the consolidated proceeding was tried before me on various dates from November 15, 1993, through December 3, 1993, at

Peoria, Illinois. In general, it is alleged that effective November 16, 1992, the Respondent withdrew its previous practice of paying the wages and benefits to certain employees who are elected by the union member ship to handle grievances full time, which payments are a mandatory subject of bargaining, and thus the Respondent violated Section 8(a)(5) of the National Labor Relations Act, as amended. 29 U.S.C. § 151 *et seq*. It is also alleged that the Respondent unlawfully refused to continue to recognize and deal with these individuals.

The Respondent argues that payments to the grievance committee chairmen and the full-time committeemen are not a mandatory subject of bargaining; therefore, as a matter of economic pressure and to pursue its bargaining ends, it was privileged to withdraw the payments. The Respondent further argues that the payments are inherently discriminatory and violative of Sections 8(a)(3) and 6(b)(2). The Respondent contends that it continued to recognize and deal with other individuals who also handle grievances and would recognize the chairmen and full-time committeemen if they applied for leaves of absence.

The Respondent also argues that the payments which it with drew were violative of Section 302 of the Act; however, this was specifically not advanced as a reason for its action. As will be discussed below, Section 302 is in issue, Counsel for the General Counsel contending she has the burden of proving that the pay in question was not violative of Section 302.

Although the captioned cases were consolidated with others for trial, they have been severed for briefing and decision. Nevertheless, those relevant portions of the record made at other times have been considered, along with briefs and arguments of counsel. Upon the record as a whole, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a Delaware corporation with its principal office at Peoria, Illinois, and facilities throughout the United States and overseas. The Respondent is engaged in the manufac-

ture and sale of heavy construction machinery and related products. In the course and conduct of this business, the Respondent annually sells and ships directly to points outside the State of Illinois, goods, products, and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The Charging Party, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Locals 145 (Aurora), 751 (Decatur), 786 (York), 974 (Peoria and Mossville) and 2096 (Pontiac) are admitted to be, and I find are, labor organizations within the meaning of Section 2(5) of the Act. Herein "Union" refers to the International alone or with together with the locals.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts in Brief.

Though the record on this phase of the case is extensive, there is really little factual dispute. To summarize: The parties' most recent collective bargaining agreement was effective from October 21, 1988, through September 30, 1991. On September 28, it was agreed to extend it indefinitely, however, on November 4, the Union terminated the extension and called a selective strike at Decatur and Building SS in East Peoria. On November 7 the Respondent locked out employees at Aurora, Pontiac and those employees at East Peoria and Mossville who had not struck. This lockout was terminated on February 16, 1992,[1] at which time the Union converted the lockout to a strike.

On or about April 1, the Respondent notified the Union and all employees that effective April 6 it would begin hiring permanent replacements if the employees did not return to work. About 1000 striking employees crossed the picket line and did

1 All dates hereafter are in 1992, unless otherwise indicated.

return. Effective April 16 the Union recessed the strike. Subsequently there have been seven short work stoppages at various of the Respondent's facilities and a general strike commencing on July 20, 1994, which continues to the date of this decision.

The events for decision here focus on the Respondent's decision, communicated to the Union on October 30, to cease paying wages-and other benefits to individuals who under the expired contract (and the Respondent's implemented final proposal) are designated grievance committee chairmen and full-time committeemen.

Article 4 of the Central Agreement sets forth the structure of "a system of Union Representation for the processing and settlement of grievances." At Aurora, Decatur, York, Pontiac, and other locations not involved here, there is established a Plant Grievance Committee which consists of some number of employee members (which differs for each plant) and a chairman. At each of these plants, and for each of the respective locals, under Article 4.6, the parties agreed that the full-time chairman would be considered on leave of absence and paid by the Respondent "his regular shift hours during the regular workweek" at the rate he was receiving just prior to election to office, and "shall conduct his business from the Local Union office." In all cases, the office is near the plant, but off the plant premises.

In addition, any "such Chairman who spends at least 8 hours in a workweek exercising the privileges and/or performing the legitimate duties of his office as set forth above will receive an additional 6 hours pay for such."

Article 4.7, along with Article 2 of the Local Supplement deals with the privileges and pay for Local 974 chairmen and full-time committeemen. For Local 974, there are 14 Grievance Committees, 12 of which have two full-time members, of whom one is the chairman. Therefore, Local 974 has 26 chairmen and full-time committeemen who are paid according to Article 4.7 of the Central Agreement, which, like 4.6, includes an additional 6 hours pay for each such individual who functions as a chairman or full-time committeeman at least 8 hours in a workweek. They

are also considered on leave of absence. The provisos and minimum requirements are not germane here.

Under Article 2 of each local supplement, it is provided that there shall be one steward for each foreman and that when exercising any of the enumerated duties, the steward will suffer no loss of pay. The steward processes grievances at Step 1. Step 2 of the grievance procedure may be handled by a part-time committeeman, who similarly will suffer no loss of pay. Apparently it is contemplated, and is the practice, that second steps can be handled by full-time committeemen (in the case of Local 974) or in all cases, the chairman. Third steps are handled by the chairman, or in his absence, a committeeman.

In addition Article 14.10 of the Central Agreement provides for unpaid leaves of absence to employees for the purpose of attending union meetings and related functions. This is sometimes referred to in the record as "union call out" and is the provision under which the chairmen and full-time committeemen are released to attend arbitration proceedings. In such cases, the part-time committeeman becomes full time and the chairman or full-time committeeman is paid by the Union.

When the Union recessed the first strike, the employees returned to work under the terms of the implemented proposal of the Respondent. This included the substance of the above outlined articles, the only changes proposed being of the housekeeping variety. Thus, stewards continued to process grievances at the first step, committeemen at the second and chairmen at the third.

The chairmen and full-time committeemen under consideration would be considered assistant business agents in the construction or retail food industry. However, unlike those individuals, who typically deal with many employers, the committeemen deal with only one. Nevertheless, they handle the grievances and contract administration for several hundred employees. And they do this full time.

Much of this record is devoted to the issue of whether the chairmen and full-time committeemen are production employees who incidentally do representational work, like stewards, or whether they are full time union employees during their tenure in office.

There are some indicators of a continuing employer/employee relationship as to the chairmen and full-time committeemen. Thus, the committeemen of Local 974 have badges and must sign in and out of their areas. They are required to be present at their respective work locations for the entirety of their respective shifts, except they may alter the time they work, in order to service other shifts, on notification to an appropriate secretary; and, they may spend eight hours each week away from the plant, at the union hall or sub-regional office.

The committeemen are given regular performance evaluations and are subject to discipline. For instance, John Harris, a grievance committee chairman for Local 974, was once given a discipline write-up for leaving the plant without permission in order to go to the local credit union on personal business.

The committeemen accrue, and can take, personal and vacation time and when they do, the part-time committeeman becomes a full-time committeeman.

Although the Local 974 chairmen and full-time committeemen are accountable for their time and attendance four days a week, the other chairmen are not at all. Under Article 4.6, they conduct business from the union hall, which is typically a short distance from the plant, however they spend some of their time at the plant in connection with investigating and handling grievances. No doubt all the chairmen and full-time committeemen of Local 974 devote most of their working day to grievances and contract administration; however, they and the other chairmen spend substantial time away from their respective plants where what they do is unknown to the Respondent.

While the Charging Party seems to maintain that never do the chairmen and committeemen do anything during the work

week other than handle grievances and engage in contract administration, such is difficult to believe. These are elected officers of their respective local unions. They are among the leadership. It is simply not credible that during their time at the local union hall, chairmen and committeemen never discuss matters of general union interest, including tactics and strategy involved in this labor dispute. Neither the General Counsel nor the Charging Party brought forth evidence tending to support the argument that these individuals in fact spend forty hours every week engaged only in grievance or contract administration activity.

Conversely there are indictors suggesting the chairmen and full-time committeemen are really employees of the Union. They are responsible to the membership for their work product. The Respondent has no control over the manner and means by which they perform their function as representatives of the employees. At most, the Respondent requires them to be present at their work area 32 hours a week; however, they have freedom to change their starting and quitting time. They need only notify an appropriate secretary.

They are "considered as on leave of absence." While the Charging Party contends this language means they are not in fact on a leave of absence, I cannot conceive what else it may mean. The "considered" I conclude relates to the fact that they are paid by the Respondent, as opposed to those on leaves without pay under Article 14.10.

The fact of the matter is that they perform no productive work for the Respondent. They do perform work for the Union. They represent employees in the second and third steps of the grievance procedure and in such capacity have authority to settle grievances on behalf of the Union and the grieving party. In this they answer to the membership, and not the Respondent. It is the Union and the membership which determines their tenure, not the Respondent.

It is no doubt the case that the Respondent retains some control over them such that in appropriate circumstances they

could be disciplined or discharged. Day to day, however, they answer to the Union and do the Union's business.

Though only required to work 40 hours per week, the chairman and committeemen are paid for 46, which the Union proposed to increase to 54. There may be some policy argument for the extra pay, such as other employees are eligible for overtime. Nevertheless, the chairmen and committeemen are paid extra because of their union elected positions.

Al Weygard, chairman for Local 145 at Aurora testified that the extra 6 hours was negotiated in 1973 because the committeemen had no opportunity to work overtime; however, he also testified that the he was paid the 6 hours irrespective of whether production employees worked overtime. In fact for some time the Union had been discouraging voluntary overtime. Weygard was entitled to, and received, the extra pay if he functioned as the chairman for just 8 hours in a workweek. He testified that his hourly rate was $16.97. Therefore, the bonus he received as chairman was $101.82 per week.

Similarly, the base pay they receive is by virtue of their union elected positions, and not because they do any production work. They are paid for being full-time committeemen. Along with the pay they are granted certain enumerated privileges and any others which have "been mutually agreed upon."

Though the precise figure is unclear, it is undisputed that the pay and benefits to the chairmen and full-time committeemen is substantial—in the range of $50,000 per individual. The Respondent estimates that the pay and benefits for them is about $1.8 million annually, an amount which is accepted by the Charging Party. Thus, for Local 974 for instance, the Respondent pays an annual subsidy of about $1,300,000 which the Local would have to pay if it had and paid the 26 chairmen and full-time committeemen designated in the contract. Presumably the work these individuals do is important. Therefore the Union would have to pay them, in the absence of the Respondent's agreement to do so.

On October 30, Jerry Brust, the Respondent's Director of Corporate Labor Relations, wrote the Union, stating, among other things, that as of November 16 the Respondent would no longer "subsidize the UAW by paying wages to or by providing coverage at no cost under the Group Insurance Plan for the Union's various chairmen of grievance committees, full-time grievance committee men or the replacements." Brust named the 29 individuals affected by this determination. He did state, however, that stewards and part-time committeemen who process grievances on an as needed basis could continue to do so without any loss of pay. And he stated that the Respondent would continue to recognize the chairmen and full-time committeemen if they applied for leaves of absence under Article 14.10.

Brust testified that this was an attempt to put economic pressure on the Union in support of its position with regard to negotiating a successor contract. He also testified that the Union had withdrawn from participation in various joint programs, had tried to influence customers not to buy the Respondent's products and in general, through these union officers, had engaged in activity to reduce production.

In subsequent discussions with committeemen who continued to seek to represent employees in grievance matters, managers of the Respondent declined to recognize them unless they requested leave under Article 14.10. The Respondent advised the Union that it would deal with committeemen who requested such leave, but not otherwise. And when most of the committeemen returned to their production jobs, the Respondent recognized only stewards and part-time committeemen as grievance handles. The Respondent would not allow the full-time committeemen to handle grievances under the no docking provisions of the contract, and such is independently alleged as violative of Section 8(a)(5).

B. Analysis and Conclusions.

1. Motion to Stay.

Inasmuch as the merits of this matter may depend on whether the suspended payments were violative of Section 302,

the Respondent has moved that the decision here be stayed until such time as the Federal District Court for the Middle District of Pennsylvania has ruled in a parallel case in which the International and York local are named defendants.[2]

This action was filed on December 22, whereby the Respondent seeks a declaratory judgment concerning the validity of payments to committeemen under Section 302. The General Counsel moved to intervene on March 16, 1993, and on April 7 the Defendants moved for a stay. The Court denied the General Counsel's motion to intervene (which was affirmed by the Third Circuit) but granted the stay.

The Respondent, in agreement with the General Counsel and the Union, notes the potential for conflicting opinions if the Section 302 issue is decided by the Board. The Respondent further contends that as the federal district courts are given primary jurisdiction to decide Section 302 cases, this matter ought to be held in abeyance until such time as the District Court enters judgment. The Respondent further contends that only through the discovery available under the Federal Rules of Civil Procedure will there be sufficient facts developed to decide the Section 302 issue.

The Respondent contends here that Section 302 is not an issue, because it had the right to withhold payments to the committeemen as a means of economic pressure. Counsel for the General Counsel maintains that she has the burden of proving no violation of Section 302, since, if the payments are found to have been unlawfully withheld, the Board must decide whether the remedial order would cause the parties to violate Section 302. *BASF Wyandotte Corp.*, 274 NLRB 978 (1985).

I believe that payments to the chairmen and full-time committee men raise a serious issue under Section 302. Even if benign, Articles 4.6 and 4.7 shift the financial responsibility for certain full-time union officials from the Union to the Respondent

2 Case 1:92-CV-1854 (M.D. Pa.).

Nevertheless, because I conclude that the payments under these articles are facially violative of Sections 8(a)(3) and 8(b)(2), whether they also may violate Section 302 need not be decided.

Therefore the Respondent's motion to stay is denied.

2. The Positions of the Parties.

The General Counsel and Charging Party contend that payment to the chairmen and full-time committeemen under Articles 4.6 and 4.7 is an established term and condition of employment. Therefore, the Respondent could not unilaterally withdraw payment; that is, the Respondent could not change this term absent bargaining to impasse about the proposed change.

The Respondent argues its right to withhold the payments from several angles, but all are based on the initial proposition that the payments were not an established term or condition of employment because they do not involve the employer/employee relationship. It argues, for instance, that the Union's in-plant campaign was unprotected and therefore such could be met by withholding what amounts to $1.8 million per year subsidy to the Union. The Respondent also argues that since the Union withdrew participation in the Employee Satisfaction Program and joint training, both of which required participation of some committeemen and thus formed some part of the reason for paying them, it could withhold the payments. And it is argued that stopping committeemen pay was an economic weapon intended to bring the contract dispute to a resolution. Such was a tactic it had the right to pursue.

Since I conclude that the General Counsel is seeking to enforce an unlawful term or condition of employment, the Respondent's several other defenses need not be considered.

3. Illegality of Extra Pay to Chairmen and Full-time Committeemen.

In *Teamsters Union Local No. 293, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (R.L. Lipton Distributing*

Co., Inc.), 311 NLRB 538 (1993) the Board held the following contract clause violative of Sections 8(a)(3) and 8(b)(2) and found the respondent union in violation of Section 8(b)(1)(A) and (2) by maintaining and enforcing it:

> The Shop Steward shall be paid, in addition to his regular rate of pay, at the rate per hour (based on forty (40) hours per week) of:
>
> $.45 per hour

The Board found that such additional payment was a form of superseniority presumptively unlawful under *Dairylea Cooperative*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2d Cir. 1976). Said the Board:

> The contractual provision requiring employers to pay union shop stewards an additional wage of 45 cents per hour on its face provides a monetary reward for service as a union agent within the plant, so it plainly has a tendency to encourage union activity. Because only stewards receive these additional payments, we find that they interfere with the unit employees' Section 7 right to refrain from engaging in union activities in violation of Section 8(b)(1)(A). 311 NLRB at 539.

The Board rejected the argument that as the contract was negotiated more than 6 months before the charge was filed, Section 10(b) was a bar. This was a continuing violation. The Board also rejected arguments that one did not have to be a union member to be a steward or that the doctrine of latches applied.

Anti-docking clauses, such as that applicable here for the stewards and part-time committeemen when engaged in handling grievances, are permissible. *E.g., Axelson, Inc.*, 234 NLRB 414, enfd. 599 F.2d 91 (5th Cir. 1976). However, it is not permissible under the Act to negotiate a contract clause whereby an employer agrees to pay some specified extra sum to employees because they act as union agents.

I reject the General Counsel's contention that the additional 6 hours is not unlawful because it "was bargained for as a term and condition of employment and applied to individuals who otherwise lost all overtime possibilities when they became full-time committee men and grievance committee chairmen." (G. C. Supplemental Brief, 10, n.3) The pay clause in *Lipton* was also agreed to by the parties.

Even if the lost overtime possibilities was a basis for distinguishing *Lipton*, which I reject, the testimony of Weygand establishes that the payments are made regardless of whether production employees work overtime. In fact, the Union had been discouraging its members from working overtime. Nor is there evidence of a nexus between overtime worked by production employees and the extra pay. If the Union believes there is some policy why the chairmen full-time committeemen ought to be paid extra, then the Union must undertake to make the payments. The employer cannot agree to do so.

Finally, it is undisputed that only members in good standing can be elected chairmen and full-time committeemen. Such necessarily excludes those bargaining unit employees who crossed the picket line and were expelled from the Union for doing so. Granting a preferential benefit to be enjoyed only by individuals who remain members of the Union and excluding those who exercised their Section 7 right to return to work is unquestionably discriminatory. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

By both the unilateral change allegation and the refusal to recognize allegation, the General Counsel seeks to require the Respondent to enforce Articles 4.6 and 4.7 of the expired Central Agreement. The Board will not find a violation of Section 8(a)(5) where the employer refuses to provide a benefit which has an unlawful disparate impact on employees. *Mead Packaging*, 273 NLRB 1451 (1985) (overruled to the extent inconsistent on another issue in *Radio and Television Broadcast Engineers Union, Local 1212, IBEW, AFL-CIO (WPIX Inc.)* 288 NLRB 374 (1988)). Where a unilateral change is required by law, as is the case here because enforcement would continue to be a violation

of the law, then there can be no finding of a Section 8(a)(5) violation. *Murphy Oil USA, Inc.*, 286 NLRB 1039 (1987).

In her brief, Counsel for the General Counsel seems to suggest that even if the 6 hours bonus is impermissible, the rest of the pay commitment in Articles 4.6 and 4.7 could not lawfully be withdrawn. I do not believe that the illegality of this term can be cured simply by ordering removal of the excess pay provision, leaving the rest of the compensation package intact. To decide here that the Respondent could unilaterally withdraw payment of the bonus but had to abide by the rest of Articles 4.6 and 4.7 would be tantamount to the Board writing a contract provision to which the parties have not agreed. It is not the prerogative of the Board to set terms and conditions of employment for the parties. *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The term of employment to which the parties agreed and under which they have operated was unlawful under the Act. It therefore cannot be enforced through a refusal to bargain proceeding, notwithstanding that the parties might be able to design a lawful method of compensating full-time committeemen.

Furthermore, excising the bonus provision from the compensation package for chairmen and full-time committeemen would not cure the fact that bargaining unit employees who have been expelled from the Union for crossing the picket line are ineligible for these positions.

Therefore, I shall recommend dismissal of these complaints. In doing so, I reiterate that stewards and part-time committeemen continued to handle grievances until the recent strike, and the Respondent offered to recognize the chairmen and full-time committeemen if they would apply for leaves of absence under Article 14.10.

On the above findings of fact and conclusions of law and on the entire record in this matter, I hereby issue the following recommended [3]

3 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall,

ORDER

The complaints in Cases 33-CA-9990 and 33-CA-10033 are dismissed in their entirety.

Dated at Washington, D.C.
January 31, 1995

James L. Rose
Administrative Law Judge

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as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.